No. 06-7517
Title: Richard Irizarry, Petitioner
v.
United States
Docketed: November 1, 2006
Lower Ct: United States Court of Appeals for the Eleventh Circuit
Case Nos.: (05-11718)
Decision Date: August 1, 2006
Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Oct 26 2006	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due December 1, 2006)
Nov 21 2006	Order extending time to file response to petition to and including January 2, 2007.
Dec 28 2006	Brief of respondent United States in opposition filed.
Jan 11 2007	DISTRIBUTED for Conference of February 16, 2007.
Mar 22 2007	DISTRIBUTED for Conference of April 13, 2007.
Jun 25 2007	DISTRIBUTED for Conference of June 28, 2007.
Dec 28 2007	DISTRIBUTED for Conference of January 4, 2008.
Jan 4 2008	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED. The brief of petitioner is to be filed on or before Thursday, February 14, 2008. The brief of respondent is to be filed on or before Wednesday, March 12, 2008. A reply brief, if any, is to be filed in accordance with Rule 25.3 of the Rules of this Court.
Jan 11 2008	Peter B. Rutledge, Esquire, of Washington, D.C., is invited to brief and argue this case, as amicus curiae, in support of the judgment below.
Jan 18 2008	Record received from the U.S.D.C. for the Southern District of Alabama. (1 box) (There are seals documents in this record)
Jan 23 2008	Record receivd from U.S.C.A. for the 11th Circuit. (1 envelope)
Jan 30 2008	SET FOR ARGUMENT ON Tuesday, April 15, 2008.
Feb 12 2008	The time to file the joint appendix and petitioner's brief on the merits is extended to and including February 21, 2008.
Feb 13 2008	The time to file respondent's brief on the merits is extended to and including March 24, 2008.
Feb 13 2008	The time to file the Court appointed brief amicus curiae in support of the judgment below is extended to and including March 24, 2008.
Feb 14 2008	Motion for leave to file Volume III of the joint appendix under seal filed by petitioner Richard Irizarry.
Feb 14 2008	Joint appendix filed. (Statement of costs filed) Jt. appendix in three volumes.
Feb 20 2008	Motion DISTRIBUTED for Conference of March 14, 2008.
Feb 21 2008	Brief of petitioner Richard Irizarry filed.
Mar 17 2008	Motion for leave to file Volume III of the joint appendix under seal GRANTED.
Mar 20 2008	CIRCULATED.
Mar 24 2008	Motion for divided argument filed by respondent United States.
Mar 24 2008	Brief of respondent United States filed. (Distributed)

Mar 24 2008	Brief of Court-Appointed Amicus Curiae In Support of the Judgment Below filed.
Mar 31 2008	Motion for divided argument filed by respondent GRANTED.
Apr 8 2008	Reply of petitioner Richard Irizarry filed. (Distributed)
Apr 15 2008	Argued. For petitioner: Arthur J. Madden, III, Mobile, Ala. For United States: Matthew D. Roberts, Assistant to the Solicitor General, Department of Justice, Washington, D.C. For amicus curiae in support of the judgment below: Pete B. Rutledge, Washington, D.C. (Appointed by this Court.)

(5)

Supreme Court, U.S.
OCT 26 2006
OFFICE OF THE CLERK

No. 06-7517

THE SUPREME COURT OF THE UNITED STATES

RICHARD IRIZARRY Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Arthur J. Madden, III
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QUESTION PRESENTED FOR REVIEW

Whether Federal Rule of Criminal Procedure 32(h), and the holding in *Burns v. United States*, 501 U.S. 129 (1991) requiring a court to provide reasonable notice to the parties that it is contemplating a departure from the applicable sentencing guideline range on a ground not identified for departure either in the presentence report or in a party's prehearing submission, has any continuing application in light of *United States v. Booker*, 543 U.S. 220 (2005).

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THE SUPREME COURT OF THE UNITED STATES

RICHARD IRIZARRY, Petitioner
v.
UNITED STATES OF AMERICA, Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Richard Irizarry petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The United States Court of Appeals for the Seventh Circuit issued an opinion on August 1, 2006, affirming Petitioner's sentence and holding that the notice requirement of Fed. R. Crim. P. 32(h) is inapplicable in the wake of *United States v. Booker*, 543 U.S. 220 (2005). The decision of the Circuit Court is reported as *United States v. Irizarry* 458 F.3d 1208 (11th Cir., 2006), and is reprinted in the appendix to this petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on August 1, 2006, 2006. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Proceedings Below

This is a direct appeal from a judgment imposed by the United States District Court for the Southern District of Alabama following Petitioner's plea of guilty to one count of making a threatening interstate communication to his ex-wife in violation of 18 U.S.C. section 875(c).

A sentencing hearing was held on March 17, 2005 at the conclusion of which Irizarry was sentenced to a term of 60 months imprisonment. Notice of appeal was filed March 22, 2005.

The parties briefed and argued the case to the United States Court of Appeals for the Eleventh Circuit. On August 1, 2006, the Court of Appeals affirmed the district court's judgment.

B. Factual Background

The relevant facts, as described by Court of Appeals in its opinion, are as follows:

> Defendant filed a factual resume that admitted these things: (1) Defendant sent the e-mail charged in Count Thirteen of the superseding indictment to his ex-wife, Leah Smith, threatening to kill her and her new husband; (2) Defendant had "sent dozens of other similar e-mails" since his divorce from Ms. Smith in 2001 in violation of a restraining order; (3) the e-mails were "intended by [Defendant] to convey true threats to kill or injure multiple persons;" and (4) Defendant "at all times relevant during the commission of this crime ··· acted knowingly and willfully."

United States v. Irizarry 458 F.3d 1208, 1209 (11th Cir. 2006)

The presentence report prepared by the United States Probation office applied U.S.S.G. § 2A6.1(b)(1) and determined a base offense level of 12 for the violation of 18 U.S.C. § 875. To that base offense level was added six levels pursuant to U.S.S.G. § 2A6.1(b)(1) since, according to the report, the conduct evidenced "an intent to carry out such threat". Irizarry objected to this six level enhancement, but did not object to other enhancements to the base offense level which were supported by the admissions contained in the factual resume. The guideline sentencing range set out in the presentence report was 41-51 months.

The court heard testimony at the sentencing hearing, which the Court of Appeals summarized as follows:

> At the sentencing hearing, Ms. Smith testified that she married Defendant in 1995, that they had two children, and that Defendant physically and mentally abused Ms. Smith and her son during the marriage. In 2000, Ms. Smith moved from California to South Carolina, where she obtained a divorce and a restraining order in 2001. Defendant drove cross-country and tracked down Ms. Smith's apartment; his van contained a hammer, rope, tarps, and duct tape. Defendant was arrested and jailed for 30 days for violating the restraining order. Ms. Smith moved to Mobile, Alabama. Between the divorce in 2001 and Defendant's arrest in December 2003, Defendant sent Ms. Smith 255 e-mails, many of which threatened to kill Ms. Smith, her husband, and her mother. Ms. Smith became especially concerned about the safety of her mother, who lived in the same city as Defendant. Ms. Smith contacted the FBI and began forwarding Defendant's e-mails to FBI agents.
>
> In 2003, Defendant called Ms. Smith at her new home and sent Ms. Smith's husband a Christmas card with a Mobile postmark. When

> Defendant was taken into custody in December 2003, his automobile contained a list of private investigators in Mobile; a print-out from an internet search service showing that a profile of Ms. Smith was available; maps of the Mobile area with notes about the location of Ms. Smith, her children's schools, and her husband's workplace; and cost estimates for travel to Mobile. During an interview with FBI agents following his arrest, Defendant threatened to shoot, car bomb, or decapitate Ms. Smith and her family and to "leave a trail of blood from here to Alabama" to protect his kids. Defendant's cellmate testified that Defendant told him that Ms. Smith's husband was abusing Defendant's children and that Defendant intended to kill or hire someone to kill Ms. Smith's husband. Defendant testified at the sentencing hearing, denying that he intended to carry out his threats against Ms. Smith and her family.

United States v. Irizarry supra, at 1210.

The district court found "that Mr. Irizarry did in fact intend and does have a current intent, if he is able to, to carry out these threats. And so think the six-point enhancement is appropriate and I so find." The Court found a total offense level of 22, criminal history category of I, yielding a guideline sentencing range of 41 to 51 months. The court then announced that:

> "I've considered all of the evidence today, I've considered everything that's in the presentence report, and I've considered the statutory purpose of sentencing and the sentencing guideline range. I find the guideline range is not appropriate in this case. I find Mr. Irizarry's conduct most disturbing. I am sincerely convinced that he will continue, as his ex-wife testified, in this conduct regardless of what this Court does and regardless of what kind of supervision he's under. And based upon that, I find that the maximum time that he can be incapacitated is what is best for society, and therefore the guideline range, I think, is not high enough.
>
> The guideline range goes up to 51 months, which is only nine months shorter than the statutory maximum. But I think in Mr. Irizarry's case the statutory maximum is what's appropriate, and that's what I'm going to sentence him.

The court sentenced Irizarry to 60 months imprisonment.

Irizarry objected to the court's upward departure from the guideline sentencing range without notice as required by Rule 32(h) of the Federal Rules of Criminal Procedure. " The district court overruled this objection, saying it believed Rule 32(h) was no longer applicable because Defendant "had notice that the guidelines were only advisory and the Court could sentence anywhere within the statutory range as defined by the United States Code statute." *Id.* at 1211. "The sentencing court did not say that it was engaged in an upward departure under the guidelines." *Id.* at 1210.

REASONS FOR GRANTING THE PETITION

This Court should grant the writ of certiorari because the decisions of the Circuit Courts of Appeal are split as to whether the Rule 32(h) notice requirement, which codified this court's decision in *Burns v. United States*, 501 U.S. 129 (1991), survives *United States v. Booker*, 543 U.S. 220 (2005). Rule 32(h) provides:

> Before the court may depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure.

Fed. R. Crim. P. 32(h).

Burns held a prior version of Rule 32 required the district court to provide the parties with reasonable notice of its contemplation of an upward departure based on factors not raised in the presentence report or prehearing submission.

"This notice must specifically identify the ground on which the district court is contemplating an upward departure." *Burns v. United States*, supra at 138-39. *Burns* sought to preserve "Rule 32's purpose of promoting focused, adversarial resolution of the legal and factual issues relevant to fixing Guidelines sentences." *Id.* at 137. This Court was concerned that "[i]n every case in which the parties fail to anticipate an unannounced and uninvited departure by the district court, a critical sentencing determination will go untested by the adversarial process contemplated by Rule 32 and the Guidelines." *Id.*

However, after *Booker* rendered the Sentencing Guidelines advisory, the circuits are divided as to Rule 32(h)'s applicability. In Irizarry the court framed the issue as "whether the notice requirement of Rule 32(h) applies to a sentence set outside the advisory guidelines range based not on the guidelines' departure provisions, but on a district court's consideration of the section 3553(a) factors" The court held that held Rule 32(h) had no application because

> After Booker, parties are inherently on notice that the sentencing guidelines range is advisory and that the district court must consider the factors expressly set out in section 3553(a) when selecting a reasonable sentence between the statutory minimum and maximum. See United States v. Talley, 431 F.3d 784, 786 (11th Cir.2005). Given Booker, parties cannot claim unfair surprise or inability to present informed comment-the Supreme Court's concerns in Burns-when a district court imposes a sentence above the guidelines range based on the section 3553(a) sentencing factors.

Id. at 1212.

The Eleventh Circuit thus joined the Third, Seventh, and Eighth Circuits

in concluding Rule 32(h) does not apply to sentencing variances. See *United States v. Vampire Nation*, 451 F.3d 189, 197-198 (3rd Cir. 2006) (holding that defendant "was not entitled to advance notice under Rule 32(h)" of a variance, but "if a court is contemplating a departure, it should continue to give notice as it did before *Booker* . . . ."); *United States v. Long Soldier*, 431 F.3d 1120, 1122 (8th Cir. 2005) ("[N]otice pursuant to Rule 32(h) is not required when the adjustment to the sentence is effected by a variance, rather than by a departure . . . . [and] [b]ecause the district court effected only an upward variance, no Rule 32(h) notice was required.") (*see also United States v. Egenberger*, 424 F.3d 803 (8th Cir. 2005). *United States v. Walker*, 447 F.3d 999, 1007 (7th Cir. 2006)(District court "not required to give advance notice before imposing a sentence above the advisory Guidelines range based on the factors set forth in § 3553(a).")

The Second, Fourth, and Ninth Circuits have upheld the applicability of Rule 32(h) in post-*Booker* cases, regardless of whether the above guideline sentence is characterized as a variance or departure. *See United States v. Khati*, 2006 WL 2075128 (2nd Cir. 2006) ("The existence of the calculated Guidelines range as the starting point for either type of sentence makes the *Burns* rationale as appropriate for a non-Guidelines sentence as for a departure."); *United States v. Davenport*, 445 F.3d 366, 371 (4th Cir. 2006) ("We . . . conclude that notice of an intent to depart or vary from the guidelines remains a critical part of

sentencing post-*Booker*."); *United States v. Evans-Martinez*, 448 F.3d 1163, 1167 (9th Cir. 2006) ("The district court's plain error in failing to provide notice of its intent to sentence above the Guideline range 'seriously affect[ed] the fairness, integrity, or public reputation' of the sentencing proceeding."). See *United States v. Dozier*, 444 F.3d 1215 (10th Cir. 2006).

The First Circuit has pointed to the circuit split as the reason to hold that there was no plain error in finding that Rule 32(h) notice was not required, given the "varying conclusions" the circuits have reached. *United States v. Mateo*, 2006 WL 1195676 (1st Cir. 2006) (unpublished opinion).

Resolution of the question of whether Rule 32(h) notice is required in every case prior to imposition of an above guideline sentence (whether characterized as a variance or a departure) is important to further the sentencing goal of avoiding unwarranted sentence disparities. 18 U.S.C. Section 3553(a)(6). Adversarial testing of the law and facts underlying sentencing determinations in the individual case promotes this overarching statutory goal and ensures fairness.

The determination of whether notice is required ought not turn on the characterization of an above guideline sentence as based on a 'variance' or a 'departure.' This is so because "[t]here is 'essentially no limit on the number of potential factors that may warrant a departure' or a variance, and neither the defendant nor the Government 'is in a position to guess when or on what grounds a district court might depart' or vary from the guidelines." *United States*

v. Davenport, 445 F.3d 366, 371 (4th Cir. 2006) (quoting *Burns*, 501 U.S. at 136-37).

CONCLUSION

A writ of certiorari should be granted to address the continued vitality of Rule 32(h) post-*Booker*. The present division of the circuits on the issue undermines the goal of avoiding unwarranted sentence disparities. 18 U.S.C. Section 3553(a)(6) Further, the absence of Rule 32(h) notice substantially impaired Irizarry's right to focused adversarial testing of the issues underlying the district court's sentencing determination.

Respectfully submitted,

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THE SUPREME COURT OF THE UNITED STATES

RICHARD IRIZARRY, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

APPENDIX

Decision of the United States Court of Appeals for the Eleventh Circuit A-1

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
AUG 1, 2006
THOMAS K. KAHN
CLERK

No. 05-11718

D. C. Docket No. 03-00236-CR-CG

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RICHARD IRIZARRY,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Alabama

(August 1, 2006)

Before EDMONDSON, Chief Judge, KRAVITCH, Circuit Judge, and MIDDLEBROOKS,* District Judge.

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*Honorable Donald M. Middlebrooks, United States District Judge for the Southern District of Florida, sitting by designation.

PER CURIAM:

Defendant Richard Irizarry plead guilty to making a threatening interstate communication to his ex-wife in violation of 18 U.S.C. section 875(c). The district court issued a sentence six months longer than the advisory guidelines range because of the likelihood Defendant would continue to threaten his wife. Defendant appeals this sentence, arguing that the district court violated Rule 32(h) of the Federal Rules of Criminal Procedure by not giving advance notice that it was considering a ground for departure not identified in the presentence report or a prehearing government submission. The district court concluded that Rule 32(h) was not applicable under the circumstances. We affirm.

I. Background

In 2003, Defendant was indicted with one count of making a threatening interstate communication in violation of 18 U.S.C. section 875(c). In 2004, a superseding indictment charged Defendant with fifteen counts of this offense. Without benefit of a plea agreement, Defendant filed a factual resume that admitted these things: (1) Defendant sent the e-mail charged in Count Thirteen of the superseding indictment to his ex-wife, Leah Smith, threatening to kill her and

her new husband; (2) Defendant had "sent dozens of other similar e-mails" since his divorce from Ms. Smith in 2001 in violation of a restraining order; (3) the e-mails were "intended by [Defendant] to convey true threats to kill or injure multiple persons;" and (4) Defendant "at all times relevant during the commission of this crime . . . acted knowingly and willfully." On motion of the United States, the district court dismissed the remaining counts.

At the sentencing hearing, Ms. Smith testified that she married Defendant in 1995, that they had two children, and that Defendant physically and mentally abused Ms. Smith and her son during the marriage. In 2000, Ms. Smith moved from California to South Carolina, where she obtained a divorce and a restraining order in 2001. Defendant drove cross-country and tracked down Ms. Smith's apartment; his van contained a hammer, rope, tarps, and duct tape. Defendant was arrested and jailed for 30 days for violating the restraining order. Ms. Smith moved to Mobile, Alabama.

Between the divorce in 2001 and Defendant's arrest in December 2003, Defendant sent Ms. Smith 255 e-mails, many of which threatened to kill Ms. Smith, her husband, and her mother. Ms. Smith became especially concerned about the safety of her mother, who lived in the same city as Defendant. Ms. Smith contacted the FBI and began forwarding Defendant's e-mails to FBI agents.

In 2003, Defendant called Ms. Smith at her new home and sent Ms. Smith's husband a Christmas card with a Mobile postmark. When Defendant was taken into custody in December 2003, his automobile contained a list of private investigators in Mobile; a print-out from an internet search service showing that a profile of Ms. Smith was available; maps of the Mobile area with notes about the location of Ms. Smith, her children's schools, and her husband's workplace; and cost estimates for travel to Mobile. During an interview with FBI agents following his arrest, Defendant threatened to shoot, car bomb, or decapitate Ms. Smith and her family and to "leave a trail of blood from here to Alabama" to protect his kids. Defendant's cellmate testified that Defendant told him that Ms. Smith's husband was abusing Defendant's children and that Defendant intended to kill or hire someone to kill Ms. Smith's husband. Defendant testified at the sentencing hearing, denying that he intended to carry out his threats against Ms. Smith and her family.

The presentence investigation report recommended two, two-level sentence enhancements because Defendant's offense violated a court protection order and involved more than two threats and, also, one six-level enhancement because the offense involved "conduct evidencing an intent to carry out such threat." See U.S.S.G. § 2A6.1(b)(1)-(3). Defendant objected to the six-level enhancement,

arguing that it was error for the district court to base a sentence enhancement on facts found using a preponderance of the evidence standard. The district court overruled the objection and applied all three sentence enhancements, leading to an advisory guidelines range of 41 to 51 months. The district court then sentenced Defendant to the statutory maximum of 60 months' imprisonment, three years' supervised release, and a $100 special assessment. The court gave the following reasons for its sentence:

> I've considered all of the evidence presented today, I've considered everything that's in the presentence report, and I've considered the statutory purpose of sentencing and the sentencing guideline range. I find the guideline range is not appropriate in this case. I find Mr. Irizarry's conduct most disturbing. I am sincerely convinced that he will continue, as his ex-wife testified, in this conduct regardless of what this Court does and regardless of what kind of supervision he's under. And based upon that, I find that the maximum time that he can be incapacitated is what is best for society, and therefore the guideline range, I think, is not high enough.
>
> The guideline range goes up to 51 months, which is only nine months shorter than the statutory maximum. But I think in Mr. Irizarry's case the statutory maximum is what's appropriate, and that's what I'm going to sentence him.

(R.69 at 69-70.) (emphasis added).

Defendant objected that the court had not given advance notice of its intent to depart upward from the sentencing guidelines as required by Rule 32(h). The

district court overruled this objection, saying it believed Rule 32(h) was no longer applicable because Defendant "had notice that the guidelines were only advisory and the Court could sentence anywhere within the statutory range as defined by the United States Code statute." The sentencing court did not say that it was engaged in an upward departure under the guidelines. Defendant now appeals his sentence, arguing that the district court violated Rule 32(h) and Burns v. United States, 111 S.Ct. 2182, 2187 (1991), by failing to give advance notice of the grounds on which the court was considering an upward departure.[1]

II. Discussion

Federal Rule of Criminal Procedure 32(h) provides:

> Before the court may depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure.

---

[1]Defendant also argues on appeal that the district court erred by applying a sentence enhancement based on facts that were neither admitted by Defendant nor found beyond a reasonable doubt. This claim is without merit. See United States v. Chau, 426 F.3d 1318, 1323-24 (11th Cir. 2005) (if district court applies guidelines as advisory, Booker does not prohibit court from making additional factual findings, under preponderance-of-the-evidence standard, that go beyond defendant's admissions).

Rule 32(h) codified the Supreme Court's statement in Burns that "before a district court can depart upward on a ground not identified as a ground for upward departure either in the presentence report or in a prehearing submission by the Government, Rule 32 requires that the district court give the parties reasonable notice that it is contemplating such a ruling." 111 S.Ct. at 2187. The Court in Burns concluded that advance notice was required to ensure "full adversary testing of the issues relevant to a Guidelines sentence" and to fulfill Rule 32's requirement that the parties have "an opportunity to comment upon . . . matters relating to the appropriate sentence." Id. at 2186.

We conclude that the above-guidelines sentence imposed by the district court in this case was a variance, not a guidelines departure. The district court correctly calculated the advisory guidelines range. The court then considered the adequacy of this range in the light of the sentencing factors listed in 18 U.S.C. section 3553(a) and the evidence presented at the sentencing hearing.[2] After

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[2]In determining the sentence to be imposed, section 3553(a) requires the district court to consider the following factors:
(1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (3) the need for deterrence; (4) the need "to protect the public from further crimes of the defendant;" (5) the need to provide the defendant with educational or vocational training or medical care; (6) the kinds of sentences available; (7) the sentencing guidelines range; (8) pertinent policy statements of the Sentencing Commission; (9) the need to avoid unwarranted sentencing disparities; and (10) the need to provide restitution to victims. 18 U.S.C. § 3553(a) (emphasis added).

concluding that the guidelines range did not adequately address the future risk Defendant posed to the public, see 18 U.S.C. section 3553(a)(2)(C), the court exercised its post-Booker discretion to impose a reasonable sentence outside the sentencing guidelines range. See United States v. Booker, 125 S.Ct. 738, 757 (2005).

We have not previously determined whether the notice requirement of Rule 32(h) applies to a sentence set outside the advisory guidelines range based not on the guidelines' departure provisions, but on a district court's consideration of the section 3553(a) factors.[3] We now join the Third, Seventh, and Eighth Circuits in concluding Rule 32(h) does not apply to such variances. See United States v. Vampire Nation, 2006 WL 1679385 at *5 (3d Cir. June 20, 2006); United States v. Walker, 447 F.3d 999, 1007 (7th Cir. 2006); United States v. Long Soldier, 431 F.3d 1120, 1122 (8th Cir. 2005).[4] After Booker, parties are inherently on notice

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[3]In United States v. Simmerer, 156 Fed.Appx. 124, 128 (11th Cir. 2005), we concluded it was not plain error for a district court to give no advance notice that it was considering a sentence above the guidelines range because there was "no precedent from this court or from the Supreme Court establishing that [Rule] 32 applies to a post-Booker upward variance." Accord United States v. Reddick, 2006 WL 1683461 at *5 (11th Cir. June 20, 2006).

[4]We accept that at least two other circuits have reached the contrary conclusion. See United States v. Davenport, 445 F.3d 366 (4th Cir. 2006); United States v. Evans-Martinez, 448 F.3d 1163 (9th Cir. 2006). Cf. United States v. Calzada-Maravillas, 443 F.3d 1301, 1305 (10th Cir. 2006) (deciding that Rule 32(h) continues to apply to guidelines departures post-Booker, but not deciding whether notice is required before a sentence variance).

that the sentencing guidelines range is advisory and that the district court must consider the factors expressly set out in section 3553(a) when selecting a reasonable sentence between the statutory minimum and maximum. See United States v. Talley, 431 F.3d 784, 786 (11th Cir. 2005). Given Booker, parties cannot claim unfair surprise or inability to present informed comment -- the Supreme Court's concerns in Burns -- when a district court imposes a sentence above the guidelines range based on the section 3553(a) sentencing factors.

We conclude that the district court was not required to give Defendant advance notice before imposing a sentence above the advisory guidelines range based on the court's determination that sentences within the advisory guidelines range did not adequately address section 3553(a) sentencing factors, particularly the need to protect the public, including Defendant's ex-wife, from further crimes of the Defendant.

The sentence imposed by the district court is AFFIRMED.

(6)

No. 06-7517 12-28-06

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD IRIZARRY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether Federal Rule of Criminal Procedure 32 requires a district court to give the parties advance notice before imposing a sentence outside the applicable advisory Sentencing Guidelines range based on the criteria in 18 U.S.C. 3553(a), when the grounds for the non-Guidelines sentence are not identified in the presentence report or the parties' prehearing submissions.

IN THE SUPREME COURT OF THE UNITED STATES

No. 06-7517

RICHARD IRIZARRY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-9) is reported at 458 F.3d 1208.

JURISDICTION

The judgment of the court of appeals was entered on August 1, 2006. The petition for a writ of certiorari was filed on October 26, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea, petitioner was convicted in the United States District Court for the Southern District of Alabama

of making a threatening interstate communication, in violation of 18 U.S.C. 875(c). He was sentenced to five years of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed his sentence.

1. A grand jury in the Southern District of Alabama returned a superseding indictment that charged petitioner with 15 counts of making a threatening interstate communication, in violation of 18 U.S.C. 875(c). Petitioner pleaded guilty to Count Thirteen of the indictment. In a written factual resume filed during his guilty plea hearing, petitioner admitted the following:

> (1) [Petitioner] sent the e-mail charged in Count Thirteen of the superseding indictment to his ex-wife Leah Smith, threatening to kill her and her new husband; (2) [petitioner] had "sent dozens of other similar e-mails" since his divorce from Ms. Smith in 2001 in violation of a restraining order; (3) the e-mails were "intended by [petitioner] to convey true threats to kill or injure multiple persons;" and (4) [petitioner] "at all times relevant during the commission of this crime . . . acted knowingly and willfully."

Pet. App. 2-3. On the government's motion, the district court dismissed the remaining counts of the indictment. Id. at 3.

The Presentence Investigation Report (PSR) noted that petitioner's offense involved more than two threats, the violation of a court protection order, and conduct evidencing an intent to carry out his threats. PSR ¶¶ 18-20. The PSR also noted that, in January 2005, after petitioner's arrest and detention, he solicited his cellmate, Jack Garris, to kill Kim Metz, his ex-wife's new husband. PSR ¶ 15. Based on all the relevant conduct, the PSR

calculated petitioner's total offense level as 22, which, combined with his criminal history category of I, yielded an advisory Sentencing Guidelines range of 41 to 51 months of imprisonment, to be followed by two to three years of supervised release. PSR ¶¶ 28, 35, 66, 70. The statutory maximum for an offense under 18 U.S.C. 875(c) is five years of imprisonment, to be followed by three years of supervised release. PSR ¶¶ 65, 69.

At the sentencing hearing, Leah Smith, petitioner's ex-wife, testified that petitioner had "terrorized" her and her family. Sent. Tr. 7. Smith stated that she had married petitioner in 1995, that they had a daughter and a son, and that petitioner had physically and mentally abused Smith and their son during the marriage. Id. at 7-8. In 2000, Smith fled from California, where she lived with petitioner, to South Carolina, where she obtained a divorce and a permanent restraining order against him. Pet. App. 3; Sent. Tr. 11. Despite the restraining order, petitioner drove cross-country in a van containing a hammer, rope, tarps, and duct tape, and showed up at Smith's apartment. As a result, petitioner was arrested and imprisoned for violating the restraining order. Pet. App. 3. Because petitioner knew where she lived in South Carolina, Smith moved to Mobile, Alabama, with her children. She later met and married her current husband. Ibid.; Sent. Tr. 13.

Smith testified that she retained an email address that she had had in California. Sent. Tr. 14. Between the divorce in 2001 and petitioner's arrest on the instant charge in December 2003, petitioner sent Smith 255 emails, many of which contained graphic threats to kill Smith, her husband, and her mother. Pet. App. 3. In addition, petitioner called Smith's home in Mobile and, in 2003, sent Smith's husband a Christmas card with a Mobile postmark. Id. at 4.

According to an FBI agent who also testified at the sentencing hearing, when petitioner was arrested in December 2003, his automobile contained a number of items indicating his intent to track down and make contact with his ex-wife or her family. Sent. Tr. 26-28. Those items included "a list of private investigators in Mobile; a print-out from an internet search service showing that a profile of Ms. Smith was available; maps of the Mobile area with notes about the location of Ms. Smith, her children's schools, and her husband's workplace; and cost estimates for travel to Mobile." Pet. App. 4. The FBI agent also testified that, after petitioner was arrested, he made a number of violent and graphic threats against Smith. Sent. Tr. 29. In particular, he stated that he intended "to shoot, car bomb, or decapitate Ms. Smith and her family and to 'leave a trail of blood from here to Alabama' to protect his kids." Pet. App. 4.

Jack Garris also testified at the sentencing hearing. He stated that "[petitioner] told him that Ms. Smith's husband was abusing [petitioner's] children and that [petitioner] intended to kill or hire someone to kill Ms. Smith's husband." Pet. App. 4. Garris also testified that petitioner threatened to kill Smith's mother, whom he blamed for his separation from Smith. Sent. Tr. 36.

Petitioner testified at the sentencing hearing as well. He denied that he had any intent to carry out the threats that he had made against his ex-wife and her family. Pet. App. 4. Petitioner claimed that Garris's testimony was false and that he had never made any threats in front of Garris. See, e.g., Sent. Tr. 52-53.

Petitioner raised various objections to the findings and recommendations in the PSR, but the district court overruled petitioner's objections and, in accordance with the PSR, determined that petitioner's advisory Sentencing Guidelines range was 41 to 51 months of imprisonment. Sent. Tr. 60-67, 70. After considering the sentencing criteria in 18 U.S.C. 3553(a), however, the court declined to sentence petitioner within the advisory Guidelines range. Sent. Tr. 69. Instead, the court sentenced petitioner to the statutory maximum of five years of imprisonment, nine months higher than the top of the Guidelines range. Id. at 70. The court also imposed three years of supervised release and a $100 special assessment. Id. at 70, 72.

The court explained:

> I've considered all of the evidence presented today, I've considered everything that's in the presentence report, and I've considered the statutory purpose of sentencing and the sentencing guideline range. I find the guideline range is not appropriate in this case. I find [petitioner's] conduct most disturbing. I am sincerely convinced that he will continue, as his ex-wife testified, in this conduct, regardless of what this Court does and regardless of what kind of supervision he's under. And based upon that, I find that the maximum time that he can be incapacitated is what is best for society, and therefore the guideline range, I think, is not high enough.

Sent. Tr. 69-70. The court also observed that the "sentence imposed addresses the seriousness of the offense and the sentencing objectives of punishment, deterrence, and incapacitation." Id. at 72.

Petitioner objected that the district court had failed to give notice of its intent to impose an "upward departure" from the applicable Guidelines range. Sent. Tr. 72. The court overruled the objection, observing that petitioner was on "notice that the guidelines were only advisory and the Court could sentence anywhere within the statutory range as defined by the United States Code." Ibid. The court "did not say that it was engaged in an upward departure under the guidelines." Pet. App. 6.

2. In a per curiam opinion, the court of appeals affirmed petitioner's sentence. Pet. App. 1-9. The court noted that Federal Rule of Criminal Procedure 32(h) states that, before a sentencing court "may depart from the applicable sentencing range

on a ground not identified for departure either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure." Pet. App. 6 (quoting Fed. R. Crim. P. 32(h)). The court further observed that Rule 32(h) is a codification of this Court's holding in Burns v. United States, 501 U.S. 129 (1991). Pet. App. 7. The court of appeals determined, however, that "the above-guidelines sentence imposed by the district court in this case was a variance" based on the court's consideration of the sentencing criteria set forth in 18 U.S.C. 3553(a), "not a guidelines departure." Pet. App. 7.

The court then considered whether Rule 32's notice requirement applies to "a sentence set outside the advisory guidelines range based not on the guidelines' departure provisions, but on a district court's consideration of the section 3553(a) factors." Pet. App. 8. Noting that the courts of appeals have disagreed on that issue, the court of appeals aligned itself with those circuits that have held that the notice requirement does "not apply to such variances." Id. & n.4. The court reasoned that,

> [a]fter [United States v.] Booker, [543 U.S. 220 (2005),] parties are inherently on notice that the sentencing guidelines range is advisory and that the district court must consider the factors expressly set out in section 3553(a) when selecting a reasonable sentence between the statutory minimum and maximum. Given Booker, parties cannot claim unfair surprise or inability to present informed comment -- the Supreme Court's concerns in Burns -- when a district court imposes a sentence above the

guidelines range based on the section 3553(a) sentencing factors.

Pet. App. 9 (internal citation omitted).

ARGUMENT

Petitioner seeks (Pet. 5-10) review of whether Federal Rule of Criminal Procedure 32 requires a district court to give the parties advance notice before imposing a sentence outside the applicable advisory Sentencing Guidelines range based on the criteria in 18 U.S.C. 3553(a) when the grounds for the non-Guidelines sentence are not identified in the PSR or the parties' prehearing submissions. Although there is a conflict among the courts of appeals on that question, this Court's review of the question is not warranted at this time, for three reasons. First, the absence of advance notice had no effect on the outcome of this case. Second, the Judicial Conference is studying the possibility of amending Rule 32 to provide clarification on the notice issue. Third, this Court should not address the notice issue until after its disposition of Claiborne v. United States, No. 06-5618 (cert. granted Nov. 3, 2006), and Rita v. United States, No. 06-5754 (cert. granted Nov. 3, 2006), because the decisions in those cases may shed light on the correct resolution of the issue.

1. a. In Burns v. United States, 501 U.S. 129 (1991), this Court construed a prior version of Rule 32 to require a sentencing court to give notice to the parties before departing sua sponte from the applicable Guidelines range. 501 U.S. at 135-139; see id.

at 135 n.4 (stating that the notice requirement applies to both upward and downward departures). The Court acknowledged that the rule contained no "express language" requiring advance notice of sua sponte departures. Id. at 132; see id. at 136. The Court concluded, however, that notice was implicitly required by the rule's mandate that the parties have "an opportunity to comment upon the probation officer's determination [in the PSR] and on other matters relating to the appropriate sentence." Id. at 135 (quoting Fed. R. Crim. P. 32(a)(1) (1990)). The Court reasoned that whether a sua sponte departure from the Guidelines is warranted is "[o]bviously * * * a 'matte[r] relating to the appropriate sentence,'" and "it makes no sense to impute to Congress an intent that a defendant have the right to comment on the appropriateness of a sua sponte departure but not the right to be notified that the court is contemplating such a ruling." Id. at 135-136 (quoting Fed. R. Crim. P. 32(a)(1) (1990)).

The Court also reasoned that reading Rule 32 to dispense with notice would be inconsistent with the rule's "purpose of promoting focused, adversarial resolution of the legal and factual issues relevant to fixing Guidelines sentences." Burns, 501 U.S. at 137. Finally, the Court relied on the doctrine of constitutional avoidance, noting that, if the Court "read Rule 32 to dispense with notice, [the Court] would then have to confront the serious

question whether notice in this setting is mandated by the Due Process Clause." Id. at 138.

In 2002, Rule 32 was amended by the addition of a new subsection that expressly codified the Court's holding in Burns. That subsection provides that the district court, before it "depart[s] from the applicable sentencing range on a ground not identified for departure either in the [PSR] or in a party's prehearing submission, * * * must give the parties reasonable notice" of "any ground on which the court is contemplating a departure." Fed. R. Crim. P. 32(h). At the same time, the language on which the Court relied in Burns was retained and designated as Rule 32(i)(1)(C). See Fed. R. Crim. P. 32(i)(1)(C) (stating that the sentencing court "must allow the parties' attorneys to comment on the probation officer's determinations and other matters relating to an appropriate sentence").

b. This Court subsequently decided United States v. Booker, 543 U.S. 220 (2005), which rendered the Sentencing Guidelines advisory rather mandatory. Since Booker, courts have considered whether Rule 32's notice requirement applies not only to a departure under the Guidelines but also to a decision by a sentencing court to exercise its post-Booker discretion to impose a non-Guidelines sentence based on the criteria in 18 U.S.C. 3553(a). In the government's view, Rule 32's notice requirement applies to such a decision.

Although Rule 32(h) refers only to "departures," Fed. R. Crim. P. 32(h), Rule 32 elsewhere continues to mandate that the district court allow the parties "to comment on * * * matters relating to an appropriate sentence," Fed. R. Crim. P. 32(i)(1)(C). As described above, this Court concluded in Burns that the mandate that the parties be allowed to comment on sentencing matters requires that they receive notice of sua sponte departures. The same reasoning that led this Court to that conclusion also indicates that notice is required before a sentencing court may impose a non-Guidelines sentence based on the criteria in 18 U.S.C. 3553(a). Just like a departure, a decision to impose a non-Guidelines sentence under Section 3553(a) is "[o]bviously" a "matte[r] relating to the appropriate sentence," and "it makes no sense to impute to Congress an intent that a defendant have the right to comment on the appropriateness of [that decision] but not the right to be notified that the court is contemplating such a ruling." Burns, 501 U.S. at 135-136.

The other reasons for the notice requirement recognized in Burns also support the conclusion that the requirement extends to notice that the sentencing court is contemplating a non-Guidelines sentence under Section 3553(a). By construing Rule 32 to require notice before imposition of non-Guidelines sentence under Section 3553(a), courts avoid the constitutional issue whether notice is

required by due process. See Burns, 501 U.S. at 138. In addition, notice promotes Rule 32's goal of "full adversarial testing of the issues relevant" to sentencing. Id. at 135. Even under the post-Booker advisory Guidelines system, determination of the Guidelines range remains the "starting point for constructing a defendant's sentence." United States v. Dixon, 449 F.3d 194, 204 (1st Cir. 2006).[1] Although the parties know that the sentencing court will consider the Section 3553(a) factors and may impose a sentence outside the Guidelines range based on those factors, "application of those factors turns on relevant facts, some of which might be in the [c]ourt's mind but not previously disclosed." United States v. Anati, 457 F.3d 233, 237 (2d Cir. 2006). If the PSR and the parties' submissions have not discussed the matter, the parties need notice of the grounds on which the court is considering imposing a non-Guidelines sentence in order to ensure the full airing of the issues that will determine the sentence. Ibid.; United States v. Evans-Martinez, 448 F.3d 1163, 1167 (9th Cir. 2006).

2. As petitioner observes (Pet. 6-7), the courts of appeals have taken differing views on whether notice is required before a court may impose a non-Guidelines sentence based on the criteria in

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[1] See, e.g., United States v. Anati, 457 F.3d 233, 236 (2d Cir. 2006); United States v. Jointer, 457 F.3d 682, 686 (7th Cir. 2006), petition for cert. pending (filed Oct. 27, 2006); United States v. Cantrell, 433 F.3d 1269, 1280 (9th Cir. 2006); United States v. Terrell, 445 F.3d 1261, 1264 (10th Cir. 2006).

Section 3553(a). The Second, Fourth, Sixth, and Ninth Circuits have held that notice is required. See Anati, 457 F.3d at 235-237; United States v. Davenport, 445 F.3d 366, 371 (4th Cir. 2006); United States v. Cousins, 2006 WL 3435608,, at *5-*7 (6th Cir. Nov. 30, 2006); Evans-Martinez, 448 F.3d at 1166-1167. The Third, Seventh, Eighth, and Eleventh Circuits have held to the contrary. See United States v. Vampire Nation, 451 F.3d 189, 195-196 (3d Cir.), cert. denied, 127 S. Ct. 424 (2006); United States v. Walker, 447 F.3d 999, 1006 (7th Cir.), cert. denied, 127 S. Ct. 314 (2006); United States v. Long Solider, 431 F.3d 1120, 1122 (8th Cir. 2005); Pet. App. 8-9.[2]

Despite the conflict among the courts of appeals, this Court's review is not warranted in this case. The absence of advance notice that the district court was contemplating a sentence outside the Guidelines range had no impact on the outcome of petitioner's sentencing proceeding. The district court varied upwards because the court was convinced that petitioner would continue to harass his ex-wife and needed to be incapacitated for as long as the law would allow. Petitioner's past conduct was detailed in the PSR. The PSR explained that petitioner had made numerous graphic and violent threats against his ex-wife and her family, repeatedly

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[2] In an unpublished decision, the First Circuit has held that a failure to give notice before imposing a variance from the advisory Guidelines range is not plain error given the circuit split on the issue. United States v. Mateo, 2006 WL 1195676, at *1 (May 5, 2006).

violated a court protection order by contacting her, and, even after he was arrested, had told his cellmate that he intended to kill or to hire someone to kill his ex-wife's new husband. The district court relied on the same or similar evidence presented at the sentencing hearing in determining that petitioner would "continue" in his threatening conduct and that therefore the "maximum time that he can be incapacitated is what is best for society." Sent. Tr. 69-70. Petitioner has never pointed to any additional evidence he would have introduced or argument he would have made if he had known before the sentencing hearing that the district court intended to impose a non-Guidelines sentence on that basis. And the sentence imposed, which was the statutory maximum, was only nine months higher than the top of the advisory Guidelines range. The outcome of this case thus would have been no different if petitioner had been provided with advance notice of the district court's intention to impose a non-Guidelines sentence, and further review of the case is not warranted.

This Court's review of the notice issue is also not warranted at this time because the Judicial Conference is studying the possibility of amending Rule 32 to provide clarification on the issue. The Committee on Rules of Practice and Procedure of the Judicial Conference recently circulated for public comment a proposal to amend Rule 32(h) to require a sentencing court to provide notice to the parties of any ground for imposing a non-

Guidelines sentence not previously identified in the PSR or by the parties. "After discussion at the Standing Committee of recent decisions taking various approaches to the question whether notice must be given, the proposed amendment to subdivision (h) was withdrawn to permit further study." See Committee on Rules of Practice and Procedure, Report of the Judicial Conference (Sept. 2006), Appendix H at 3. If, after that further study, the Conference decides to clarify the Rule, this Court's intervention would be unnecessary.

Finally, review would also be premature at this juncture because cases currently pending before the Court may shed light on the proper resolution of the notice issue. The Court recently granted certiorari in Claiborne v. United States, No. 06-5618 (cert. granted Nov. 3, 2006), and Rita v. United States, No. 06-5754 (cert. granted Nov. 3, 2006), to address several questions about post-Booker sentencing. The decisions in those cases are likely to clarify the role of the Sentencing Guidelines in the post-Booker sentencing regime. The decisions therefore may provide insight into the importance that notice of a court's intention to impose a non-Guidelines sentence has for achieving Rule 32's goal of full adversary testing of the issues relevant to sentencing.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

RICHARD IRIZARRY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether a district court must provide a criminal defendant notice of the contemplated grounds for a sentence above the range recommended by the Sentencing Guidelines.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 458 F.3d 1208 and is reprinted in the Joint Appendix ("J.A.")[1] at 392-400. The district court's orders are unreported but are reprinted at J.A. 260-71, 277-84, 288-90, and 381-91.

JURISDICTION

The district court had jurisdiction pursuant to 18 U.S.C. § 3231. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

The judgment of the court of appeals was entered on August 1, 2006. The petition was filed on October 26, 2006, and granted on January 4, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION, STATUTE, AND RULES INVOLVED

The constitutional provision, statutory provision, and rules of criminal procedure involved in the case are set forth in the appendix to this brief at 1sa-10sa. *See* S. Ct. Rule 24.1(f).

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[1] The Joint Appendix comprises three volumes, the third of which contains material filed under seal.

STATEMENT OF THE CASE

A. Statutory Background

1. The Sentencing Reform Act of 1984 (SRA), 18 U.S.C. § 3551-3742 and 28 U.S.C. § 991-998, "revolutionized" criminal sentencing in federal courts by establishing the United States Sentencing Commission and charging it with the development of a system of Sentencing Guidelines based on factors set forth in 18 U.S.C. § 3553(a). *Burns v. United States*, 501 U.S. 129, 132-33 (1991). Under the SRA, district courts were required to impose a sentence within the applicable Guidelines range unless they found "that there exist[ed] an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration" by the Guidelines. 18 U.S.C. § 3551(b)(1) (Supp. IV 2004). The Sentencing Commission specified a number of permissible grounds for departure from the Guidelines range, *see* U.S. Sentencing Guidelines Manual (U.S.S.G.) ch. 5, pt. K, but it also explained that the list was "not exhaustive" and that district courts were free to depart "on grounds not mentioned in the guidelines" in an appropriate case. U.S.S.G. ch. 1, pt. A4(b) (1991).

The SRA also amended Federal Rule of Criminal Procedure 32 to "provide[] for focused, adversarial development of the factual and legal issues relevant to determining the appropriate Guidelines sentence." *Burns*, 501 U.S. at 134. Among other provisions, Rule 32 directs the probation officer to prepare a presentence report addressing

matters relevant to the defendant's sentence. Fed. R. Crim. P. 32(c).

In *Burns*, this Court held that "before a district court can depart upward on a ground not identified as a ground for upward departure either in the presentence report or in a prehearing submission by the Government, Rule 32 requires that the district court give the parties reasonable notice that it is contemplating such a ruling." 501 U.S. at 138.

2. In *United States v. Booker*, 543 U.S. 220 (2005), the Court held that the SRA violated the Sixth Amendment right to a jury trial. *Id.* at 244. As a remedy, the Court severed the provision of the Act that made the Guidelines mandatory. *Id.* at 245 (severing two provisions, including 18 U.S.C. § 3553(b)(1) (Supp. IV 2004)). As a result of *Booker*, the Guidelines are "effectively advisory," and a district court is now free to impose any sentence within the range permitted by statute, based on the factors set forth in Section 3553(a). *Booker*, 543 U.S. at 245; *see also Gall v. United States*, 128 S. Ct. 586, 594 (2007).

B. Factual Background

1. Petitioner Richard Irizarry suffers from a borderline personality disorder with paranoid and antisocial features. J.A. 128, 267.[2] His symptoms include emotional volatility, recurrent ideations of

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[2] Mr. Irizarry has consistently denied that he is affected by any mental illness or defect. On appeal he accepts, for the sake of argument, the contrary findings of the district court. *See* J.A. 267.

suicide, and frantic efforts to avoid real or imagined abandonment. *Id.* at 128-30. Most prominently, he suffers from "transient stress-related paranoid ideations, especially suspiciousness," that are global and pervasive. *Id.* at 130. Because of his mental illness, without any "justifiable basis" he harbors suspicions of exploitation and infidelity, doubts the loyalty of friends and family members, and persistently bears grudges. *Id.* at 131.

Despite the seriousness of his condition, Mr. Irizarry has only "a modest history of mental health treatment." *Id.* at 133. He has undergone two "brief psychiatric hospitalizations," once in 2000 and again in September 2002, but both times he was treated only with antidepressant medications, which did not target his paranoia. *Id.* at 133-34. Later, while incarcerated, he initially took antidepressants but discontinued the treatment on his own. *Id.* at 134.

2. Mr. Irizarry and his ex-wife, Leah Smith, were married in 1995 and have two children. In 2000, she left him, took the children, and moved from California to South Carolina. In 2001, she obtained a divorce and a restraining order against him in a South Carolina court. J.A. 394.

After she left, Mr. Irizarry developed a number of paranoid fantasies about his ex-wife. He became convinced that she had hacked the computer systems of the Ku Klux Klan, that she was sending him threatening letters, and that she was physically abusing the children by whipping them, forcing them to sleep outside, and ripping

out their toenails with pliers. J.A. 42, 45, 51, 53, 66-67, 70-71, 157. In 2001, he drove to South Carolina and was jailed for 30 days for violating the restraining order. *Id.* at 394. In his car, police found a hammer, rope, tarps, and duct tape. *Id.* The actions of the South Carolina police, he maintains, are part of "a conspiracy to destroy evidence that might help [him]." *Id.* at 79-80, 102. His ex-wife remarried and moved to Mobile, Alabama, with the children. *Id.* at 394.

Between August and December of 2003, while living in California, Mr. Irizarry sent a series of e-mail messages to his ex-wife in Alabama. In the messages, he explicitly threatened to kill his ex-wife, her husband, her mother, and several of her acquaintances. J.A. 273-75, 394. The e-mail messages also stated that he was in contact with two governors, that a district attorney had assured him he could bring a federal case against his ex-wife for abusing the children, and that he was traveling to various destinations in the United States and Canada simultaneously, in some cases with a group of "ex-guerilla warfare soldiers." *Id.* at 177; *see* J.A. 420-48.

Mr. Irizarry was arrested in December 2003, and in an interview with the FBI he repeated his threats. J.A. 394. In his vehicle, police found computer printouts, dated more than a year earlier, suggesting that he had planned to travel to Mobile to find his ex-wife and children. J.A. 394; *see id.* at 330-31. He maintained that he intended to commit a federal crime and to be apprehended, for the purpose of launching an FBI investigation

into "all the things" his ex-wife had done. J.A. 74. Specifically, his goal in getting caught was to "expose [his ex-wife's] involvement with the Klan . . . and her abuse of the children." *Id.* at 108-09. He says that the plan "backfired." *Id.* at 74. He has alleged that the FBI is withholding information "as part of a conspiracy to let [his] ex-wife win." *Id.* at 105; *see id.* at 177.

C. Procedural History

1. Mr. Irizarry was indicted by a grand jury in the United States District Court for the Southern District of Alabama on fifteen counts of transmitting electronic communications containing threats to kill or injure, in violation of 18 U.S.C. § 875(c). J.A. 19-21. A federal public defender was appointed to represent him. He entered a plea of not guilty and gave notice of his intent to raise an insanity defense. *Id.* at 11. The district court ordered Mr. Irizarry to undergo an examination to determine, *inter alia*, whether he was suffering from a mental disease or defect that rendered him unable to understand the nature and consequences of the proceedings against him and to assist in his defense. *Id.* at 16.

The district court conducted a competency hearing and heard testimony from expert witnesses for the defense and prosecution. J.A. 25-258. The government's forensic psychologist testified that Mr. Irizarry suffers from an anxiety disorder and a borderline personality disorder with paranoid and antisocial features. *Id.* at 126-28. He testified that Mr. Irizarry's condition is characterized by "instability in pretty much every do-

main," *id.* at 128, and involves global and pervasive paranoid ideations, *id.* at 130. The district court agreed with the government's expert that Mr. Irizarry was "suffering from a mental condition," but that he was competent to stand trial. J.A. 267.

Because the scope of the hearing was limited to competency, however, the court did not consider Mr. Irizarry's future dangerousness or whether his condition was treatable.[3] In fact, at one point in the hearing, the court specifically cut off testimony about the risk that Mr. Irizarry would pose a danger in the future. When the expert witness for the defense began to discuss "concerns about the potential dangerousness," noting that "[t]he best statistical predictor of dangerousness is a history of having been dangerous," J.A. 188, the district court interrupted, asking "how is this relevant to what I have to determine right now?" *Id.* Defense counsel stated that she wanted to present testimony about "third-party risk." *Id.* The district court replied, "I know. But how does that relate to his competency to stand trial?" *Id.* at 189. In light of the court's ques-

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[3] Mr. Irizarry indicated a willingness to undergo treatment. J.A. 257-58. The government's psychologist also testified that there are medications that "could mitigate" even serious delusional symptoms, noting the availability of antipsychotic drugs that "would work . . . particularly well" on "delusions or hallucinations, these thinking and perceptual disturbances." *Id.* at 146. Both experts suggested that the antidepressant medications he had taken in the past had little effect. *Id.* at 133-34, 193.

tions, counsel said, "I'll change course, Your Honor." *Id.*

2. Mr. Irizarry pleaded guilty to one count of the indictment, and the government dismissed the remaining counts. J.A. 272-76, 393. In a factual resume, he admitted that he sent a threatening e-mail message through interstate commerce to his ex-wife. He further admitted that the message was "intended . . . to be a true threat to kill or injure" his ex-wife and her new husband, and that his "intention was that [they] take the threat seriously." *Id.* at 274-75. He also admitted that, since the divorce, he had sent "dozens of other similar e-mails" and that he did so in violation of the South Carolina restraining order. *Id.* at 275. The court accepted the guilty plea and set a date for sentencing. *Id.* at 277-78.

One week later, defense counsel made a motion for Mr. Irizarry to be hospitalized pursuant to 18 U.S.C. § 4244 so that he could receive mental health treatment prior to sentencing. J.A. 285-87. In ruling, the court noted that, although the psychologists testifying at the competency hearing "disagreed on the diagnosis, all opined that Mr. Irizarry is suffering from a mental condition," and so granted the relief "[b]ased on the motion and the court's knowledge of Mr. Irizarry from the proceedings in this case." *Id.* at 288-90. Shortly thereafter, his attorney moved to withdraw as counsel, citing information she received from third parties and professional ethical considerations. J.A. 291-92. The court granted the motion and appointed Arthur Madden as new counsel.

On January 19, 2005, one week after this Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), the probation office filed its presentence investigation report (PSR). The PSR calculated a Guidelines sentencing range of 41 to 51 months, based on a category I criminal history and an adjusted offense level of 22. J.A. 415. The offense level reflected enhancements for "conduct evidencing an intent to carry out [the] threat," *see* U.S.S.G. § 2A6.1(b)(1), for making multiple threats, *see* U.S.S.G. § 2A6.1(b)(2), and for violating a court protection order, *see* U.S.S.G. § 2A6.1(b)(3). J.A. 407. The PSR recommended that there be no downward adjustment for acceptance of responsibility under U.S.S.G. § 3E1.1. J.A. 406.

Under the heading "Factors That May Warrant Departure," the PSR stated that "[p]ursuant to Guidelines 4A1.3 (Adequacy of Criminal History Category), the Court may consider whether or not the defendant's criminal history category adequately reflects the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes." J.A. 417. "If not," the PSR continued, "the Court may consider imposing a sentence departing from the otherwise applicable Guidelines range." *Id.*

Mr. Irizarry filed written objections to the PSR challenging, among other conclusions, its description of his criminal history and its application of enhancement for conduct evidencing an intent to carry out the threat. J.A. 295-96, 418. The government did not object to the PSR and did not re-

quest an above-Guidelines sentence. *Id.* at 293-94, 418.

D. Sentencing Hearing

On March 17, 2005, the district court conducted a sentencing hearing. It heard victim impact testimony from Ms. Smith, Petitioner's ex-wife, who said that she was "certain" that he would "not stop terrorizing" her family. J.A. 320. The court also heard from Mr. Irizarry's former cellmate, who testified that even after the arrest, Mr. Irizarry threatened to kidnap his children and kill his ex-wife's mother. *Id.* at 335-37. The cellmate testified that Petitioner experienced massive mood swings while in jail, during which he would fly into "a rage" and "beat his head against the wall." *Id.* at 335. Mr. Irizarry testified that he knew his conduct was wrong and that he accepted responsibility for his actions. J.A. 348. He testified that, contrary to statements in the e-mail messages, he had never purchased any bombs, guns, or knives, or other "stuff like that." *Id.* at 351-52.

The court overruled Mr. Irrizary's objections and accepted the PSR's calculation of the Guidelines range. J.A. 372. When it announced the sentence, however, it also indicated for the first time that it intended to impose a sentence above the Guidelines range, finding that "the Guidelines range is not appropriate in this case." J.A. 374. The court based its upward variance from the Guidelines on Mr. Irizarry's future dangerousness:

> I find Mr. Irizarry's conduct most disturbing. I am sincerely convinced that he will continue, as his ex-wife testified, in this conduct regardless of what this court does and regardless of what kind of supervision he is under. And based upon that, I find that the maximum time that he can be incapacitated is what is best for society, and therefore the guideline range, I think, is not high enough.

Id. at 374-75. The court announced a sentence of 60 months of imprisonment, the statutory maximum, to be followed by three years of supervised release. *Id.* at 375.

Defense counsel immediately objected that "the sentence constitutes an upward departure from what the court found to be the applicable Guidelines range" and "[w]e didn't have notice of its intent to upwardly depart." J.A. 377. The court flatly stated that no such notice is required: "I think the law on that is out the window." *Id.* Defense counsel repeated his objection "to [the] failure to give notice of the court's intention to upwardly depart." *Id.*

E. Proceedings on Appeal

Mr. Irizarry appealed, arguing that the district court erred in failing to provide notice of the contemplated grounds for its *sua sponte* departure from the Guidelines range as required by *Burns v. United States*, 501 U.S. 129 (1991) and codified in Federal Rule of Criminal Procedure 32(h). The Government conceded that the district court had erred in failing to provide notice, but argued that

the error was harmless beyond a reasonable doubt under *Chapman v. California*, 386 U.S. 18, 22-24 (1967). Gov't C.A. Br. 11, 17-18.

The court of appeals affirmed, finding no error, and thus not reaching the question of harmlessness. J.A. 392-400. It agreed that the district court had issued a sentence longer than the advisory Guidelines range "because of the likelihood Irizarry would continue to threaten his wife." *Id.* at 392; *see id.* at 396. It also recognized that, under this Court's holding in *Burns*, "before a district court can depart upward on a ground not identified as a ground for upward departure either in the presentence report or in a prehearing submission by the Government, Rule 32 requires that the district court give the parties reasonable notice that it is contemplating such a ruling." *Id.* at 397 (quoting *Burns*, 501 U.S. at 138); *see* Fed. R. Crim. P. 32(h).

Nonetheless, the court held that no error occurred because "the above-guidelines sentence . . . in this case was a variance, not a guidelines departure." J.A. 398. Rather than departing on a ground specified in Chapters 4 and 5 of the Sentencing Guidelines, the district court had considered the sentencing factors set forth in 18 U.S.C. § 3553(a), including the need "to protect the public from further crimes of the defendant," 18 U.S.C. § 3553(a)(2)(C), and exercised its discretion under *Booker* to impose an above-Guidelines sentence. *Id.* at 398-99 & n.2. No notice is required under those circumstances, the court explained, because "[a]fter *Booker*, parties are inherently on notice

that the sentencing guidelines range is advisory" and that any of the Section 3553(a) factors may justify a non-Guidelines sentence. *Id.* at 399-400. The court therefore concluded that "the district court was not required to give Irizarry advance notice" of its contemplated grounds for varying from the Guidelines. *Id.* at 400. It acknowledged that its holding conflicted with the decisions of several other courts of appeals. *Id.* at 399 n.4.

SUMMARY OF ARGUMENT

1. In *Burns*, this Court held that Rule 32 imposes a requirement that the district court provide reasonable notice before departing from the Guidelines range. The notice requirement was driven by three considerations. The text of Rule 32 guarantees the parties an opportunity to comment on the factors relevant to sentencing, an opportunity that necessarily requires notice of the grounds for departing. Notice was also required to ensure focused adversarial testing of the grounds for the sentence. Moreover, a notice requirement permitted the Court to avoid the "serious" constitutional question of whether due process requires notice under the circumstances.

Each of those reasons applies with equal or greater force to above-Guidelines sentences under *Booker* and Section 3553(a). Just as a defendant needs notice to meaningfully "comment" on a sentence that departs under the Guidelines, parties need notice to comment on a non-Guidelines sentence. Furthermore, Rule 32(h) was enacted in 2002 as a codification of the holding in *Burns* and requires reasonable notice of the contemplated

grounds for "departures" from the Guidelines. The plain meaning of the term "departures" easily includes a post-*Booker* "variance" sentence that departs from the standards set out in the now "effectively advisory" Guidelines.

Moreover, a rule that required reasonable notice only for Guidelines departures—but not for above-Guidelines sentences under Section 3553(a)—would contravene the purpose of Rule 32 to provide focused adversarial testing of the grounds for the sentence. The Court in *Burns* was concerned that a lack of notice would lead to wasteful, scattershot argument by parties trying to anticipate every conceivable ground for departure, or to resignation in the face of that daunting task. Those concerns apply fully to post-*Booker* sentences under Section 3553(a). Indeed, because *Booker* expanded the discretion of district courts and the universe of permissible reasons for a non-Guidelines sentence, the need for reasonable notice is even more acute after *Booker* than before. A notice requirement that turns on an artificial distinction between Guidelines departures and non-Guidelines sentences under *Booker* would also pose problems of administrability.

Importantly, the same serious constitutional question that the Court avoided in *Burns* is present in this setting. Without reasonable notice of the grounds for a non-Guidelines sentence, there is a serious concern that the defendant's right to notice and fair opportunity to comment on the grounds for his incarceration would be violated. This serious constitutional concern supplies an

additional reason to construe Rule 32 to impose a requirement of reasonable notice for all non-Guidelines sentences.

2. In this case, the failure to provide notice affected Mr. Irizarry's substantial rights and necessitates a new sentencing hearing. Although the Government has suggested that the error in this case was harmless (Gov't Br. in Opp. 13), this Court need not address that question in the first instance and should instead follow its usual practice of remanding to the court of appeals for harmless error review. Moreover, a remand to the court of appeals would permit this Court to avoid resolving the due process question not reached in *Burns*. On this record, the Government cannot possibly carry its burden of excusing a constitutional error by showing that the failure to provide notice was harmless beyond a reasonable doubt. And application of any lesser standard of review would, of course, require resolution of the constitutional question avoided in *Burns*. The better course is to remand the matter to the court of appeals.

If the Court chooses to address the question, the record makes clear that the failure to provide notice in this case was not harmless. The district court entered the statutory maximum sentence based on an assumption about Mr. Irizarry's future dangerousness. That assumption was not tested at the sentencing hearing, however, because defense counsel was never informed of the contemplated grounds for an above-Guidelines sentence. The record in this case demonstrates

that, had counsel received reasonable notice, he would have introduced expert testimony challenging the court's assumption about future dangerousness by showing that Mr. Irizarry's symptoms could be successfully treated through antipsychotic medications and psychotherapy. He also would have shown that alternative forms of supervision would be preferable to incarceration, which was likely to *increase* his delusional ideations. Evidence of all of this was readily available to defense counsel because it had been prepared for the competency hearing, but the testimony was cut short by the district court. A new hearing is required so that the district court can impose a sentence after a process by which the adversarial process has tested the district court's assumptions about Mr. Irizarry and his future dangerousness.

ARGUMENT

I. THE DISTRICT COURT ERRED IN FAILING TO PROVIDE REASONABLE NOTICE BEFORE IMPOSING AN ABOVE- GUIDELINES SENTENCE UNDER *BOOKER*

The district court erred in concluding that it had authority to enter a sentence above the Guidelines range without providing reasonable notice of the contemplated grounds for that action. As this Court explained in *Burns v. United States*, 501 U.S. 129 (1991), the text and purposes of Rule 32, the proper functioning of the adversarial process, and serious due process concerns compel the conclusion that a district court must

provide reasonable notice to a criminal defendant before imposing a sentence greater than that suggested by the Guidelines. Nothing in this Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), alters that analysis. To the contrary, by expanding the discretion of the sentencing court, *Booker* made the requirement of reasonable notice *more* rather than less important to the full and fair adversarial testing of the grounds for the sentence.

A. Rule 32 Compels A Sentencing Court To Provide Reasonable Notice Of The Contemplated Grounds For An Above-Guidelines Sentence Based On Section 3553(a)

1. In *Burns*, this Court considered whether a district court was authorized to depart from the then-mandatory Guidelines range "without first notifying the parties that it intend[ed] to depart." 501 U.S. at 131. There, the government had not requested a departure before the hearing, and the PSR stated that there were "no factors that would warrant departure from the guideline sentence." *Id.* Notwithstanding the absence of a provision "expressly obliging the district court to announce that it is contemplating to depart *sua sponte*," the Court held that, for three reasons, such a requirement was implicit in Rule 32 of the Federal Rules of Criminal Procedure. *Id.* at 136.

First, the Court identified a textual basis for the notice requirement. It observed that Rule 32(a)(1), now codified as Rule 32(i)(1)(C), provides both parties with an opportunity to comment on

the PSR and other matters related to the proper sentence. *Burns*, 501 U.S. at 132; Fed. R. Crim. P. 32(i)(1)(C) ("At sentencing, the court . . . must allow the parties' attorneys to comment on the probation officer's determinations and other matters relating to an appropriate sentence."). It would make no sense, the Court reasoned, "to impute to Congress an intent that a defendant have the right to *comment on* the appropriateness of a *sua sponte* departure but not the right to be *notified* that the court is contemplating such a ruling." *Burns*, 501 U.S. at 135-36 (emphasis added).

Second, the Court held that failing to provide notice of a *sua sponte* departure would be "inconsistent with Rule 32's purpose of promoting focused, adversarial resolution of the legal and factual issues relevant to fixing Guidelines sentences." *Id.* at 137. In the absence of a notice requirement, the Court explained, "[a]t best" the parties might "address possible *sua sponte* departures in a random and wasteful way by trying to anticipate and negate every conceivable ground on which the district court might choose to depart on its own initiative," while "[a]t worst, and more likely, the parties will not even try to anticipate such a development," leaving the contemplated grounds for departure untested by the adversarial process. *Id.*

Third, the Court's construction of Rule 32 avoided "the serious question whether notice in this setting is mandated by the Due Process Clause." *Id.* at 138. For those reasons, the Court held that "before a district court can depart up-

ward on a ground not identified as a ground for upward departure either in the presentence report or in a prehearing submission by the Government, Rule 32 requires that the district court give the parties reasonable notice that it is contemplating such a ruling." *Id.*

Each of the reasons that justified a notice requirement for Guidelines departures in *Burns* applies with equal or greater force in the case of an above-Guidelines sentence based on the Section 3553(a) factors.

2. There are two textual bases for a requirement of reasonable notice under these circumstances. Rule 32 was amended in 2002 to include paragraph (h), which provides that:

> Before the court may depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure.

Fed. R. Crim. P. 32(h). The new provision was intended to codify the holding of *Burns*. Fed. R. Crim. P. 32 advisory committee notes (2002 amendments) ("Rule 32(h) is a new provision that reflects *Burns* . . . ."). Although the term "departure" often refers to a non-Guidelines sentence imposed on grounds specified in Chapters 4 and 5 of the Guidelines, Rule 32(h) uses that term only because it was promulgated before this Court's

decision in *Booker* and reflects the terminology of the then-mandatory Guidelines regime. There is no reason to believe that the Court in *Burns* or the drafters of Rule 32(h) intended to *exclude* any above-Guidelines sentences from the notice requirement. See also note 4 *infra*.

In addition, Rule 32 continues to afford parties an opportunity "to comment" on the PSR "and other matters relating to an appropriate sentence." Fed. R. Crim. P. 32(i)(1)(C). As this Court reasoned in *Burns*, a right to comment implies a right to make *informed* comment, and that right would have "little reality or worth" without giving counsel reasonable notice of the grounds on which the district court is contemplating an above-Guidelines sentence based on Section 3553(a). 501 U.S. at 136 (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)); *see United States v. Anati*, 457 F.3d 233, 236 (2d Cir. 2006) ("[T]he same reasoning that persuaded the Supreme Court [in *Burns*] to apply the comment opportunity . . . to sua sponte departures under the mandatory Guidelines regime" applies to a "non-Guidelines sentence under the advisory Guidelines regime.").

3. Further, a failure to provide reasonable notice of the contemplated grounds for an above-Guidelines sentence based on the Section 3553(a) factors would contravene the purpose of Rule 32 to promote the focused, adversarial testing of those grounds. *Burns*, 501 U.S. at 137.

The Guidelines continue to play a crucial role in the sentencing process after *Booker*. Because

Section 3553(a)(4) requires that the district court consider the Guidelines range in every case, *Booker*, 543 U.S. at 246, a district court "should begin all sentencing proceedings by correctly calculating the applicable Guidelines range." *Gall v. United States*, 128 S. Ct. 586, 596 (2007). A district court must also "give serious consideration to the extent of any departure from the Guidelines" and must provide "sufficient justifications" for the sentence imposed. *Id.* at 594. Although a sentencing court may not presume that a Guidelines sentence should apply, *Rita v. United States*, 127 S. Ct. 2456, 2465 (2007), *rehearing denied*, 128 S. Ct. 19 (2007), "[a]s a matter of administration and to secure nationwide consistency," the Guidelines serve as "the starting point and the initial benchmark" in every case. *Gall*, 128 S. Ct. at 596.

The concerns articulated by the Court in *Burns* therefore apply with equal force to sentences above the Guidelines range under *Booker*. Rule 32 was designed to "promot[e] focused, adversarial resolution of the legal and factual issues" at sentencing. *Burns*, 501 U.S. at 137. As the Court explained in *Burns*, without notice of the contemplated grounds for departure, "[a]t best . . . parties will address possible *sua sponte* departures in a random and wasteful way by trying to anticipate and negate every conceivable ground on which the district court might choose to depart on its own initiative." *Id.* "At worst, and more likely," the Court warned, "the parties will not even try to anticipate such a development" and the contemplated grounds for deviating from the Guidelines will go entirely untested. *Id.* Without

notice of the contemplated grounds for an above-Guidelines sentence based on Section 3553(a), the same potential exists that the parties will waste their efforts by shooting in the dark or that they will abandon the effort entirely. *United States v. Evans-Martinez,* 448 F.3d 1163, 1167 (9th Cir. 2006) (because a district court after *Booker* "has the discretion to sentence both above and below the range suggested by the Guidelines," the parties "must receive notice the court is contemplating such a possibility in order to ensure that issues with the potential to impact sentencing are fully aired") (internal citations omitted).

4. Construing Rule 32(h) to require notice of a Guidelines departure — but not an above-Guidelines sentence based on Section 3553(a)— would also create an artificial distinction. Factors that have long served as grounds for Guidelines departures, such as the inadequacy of the defendant's criminal history, U.S.S.G. § 4A1.1, or the defendant's extreme conduct, U.S.S.G. § 5K2.8, can now be reformulated as grounds for a non-Guidelines sentence under Section 3553(a). *See* 18 U.S.C. § 3553(a)(1) (requiring that the sentencing court consider "the nature and circumstances of the offense and the history and characteristics of the defendant"). Because the same ground can justify the same above-Guidelines sentence under either the Guidelines or Section 3553(a), it would make no sense for the notice requirement to turn on the district court's characterization of the basis for its sentence.

The distinction would create administrability problems as well. Last year, district courts imposed approximately 8,535 sentences outside the Guidelines range. More than half of those sentences (57.5%, or 4,906 sentences) were based on *Booker* or the Section 3553(a) factors, and fewer than one-quarter (22.4%, or 1,916 sentences) were Guidelines departures. In the remaining cases, however, the district court either relied on *both* the Guidelines and *Booker* or Section 3553(a) (11.8%, or 1,007 sentences), or specified *neither* basis (8.3%, or 706 sentences).[4] Under a rule that limits Rule 32(h) to departures under the Guidelines, if the district court fails to specify the basis for its sentence or purports to have imposed both a Guidelines departure and a sentence under *Booker*, the parties would have no way of knowing whether they were entitled to notice. In such cases, Rule 32(h) would be of "little reality or worth." *Burns*, 501 U.S. at 136 (quoting *Mullane*, 339 U.S. at 314).

5. This Court's decision in *Rita v. United States* confirms that Rule 32(h) applies equally to Guidelines departures and *Booker* variances. In describing the order of operations at sentencing after *Booker*, the Court emphasized that a district court "as a matter of process" must "subject[] the

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[4] United States Sentencing Commission, FY2007 4th Quarterly Sentencing Update, at Table 1 & nn.1-5 (Dec. 5, 2007), http://www.ussc.gov/sc_cases/Quarter_Report_ 4th_ 07.pdf. These figures reflect sentences from October 1, 2006, to September 30, 2007. They include both above- and below-Guidelines sentences, but exclude government-sponsored departures. *See id.* n.6.

defendant's sentence to the thorough adversarial testing contemplated by federal sentencing procedure." *Rita*, 127 S. Ct. at 2465. It expressly relied on Rule 32(h), Rule 32(i)(1)(C), and *Burns*, which underscore the "importance of notice and [a] meaningful opportunity to be heard at sentencing." The Court's invocation of notice as a prerequisite to the mandatory adversarial testing of a post-*Booker* sentence subject to reasonableness review suggests that notice remains mandatory for both departures and variances under the current Sentencing Guidelines regime.

6. Finally, allowing the district court to impose a non-Guidelines sentence without reasonable notice to the defendant would raise precisely the "serious" due process question that the Court in *Burns* sought to avoid. 501 U.S. at 138. The Fifth Amendment guarantee of due process requires "at a minimum . . . that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane*, 339 U.S. at 313. The right to notice and a hearing continues at trial and at sentencing. *Gardner v. Florida*, 430 U.S. 349, 356, 358 (1977) (plurality opinion) (holding that the failure to provide defense counsel access to evidence violates due process by depriving the defendant of an "opportunity . . . to challenge the accuracy or materiality" of the information).

This Court has held that due process requires the district court to provide the defendant with an opportunity to correct misinformation that may serve as a basis for the sentence. *Townsend v.*

Burke, 334 U.S. 736, 741 (1948). In *Townsend*, the sentencing court relied on two prior convictions from cases where the defendant, in fact, had been acquitted. *Id.* at 740. Justice Jackson's opinion for the Court held that the sentence violated due process because it is "a requirement of fair play" that the sentence is "not predicated on misinformation." *Id.* at 741. Consistent with that requirement, the Federal Rules of Criminal Procedure guarantee that the parties receive notice throughout the sentencing process. *See* Fed. R. Crim. P. 32(c), (d)(1)(D)(ii), (d)(1)(E), (e)(2), (f), (i)(1)(C). Section 3553(a) also imposes a statutory requirement that the district court impose a sentence "sufficient, but not greater than necessary" to comply with the purposes set forth in Section 3553(a)(2).

B. The Court Of Appeals Erred In Holding That No Notice Is Required For Non-Guidelines Sentences Under Section 3553(a)

1. The court of appeals held that Rule 32 imposes no notice requirement for *Booker* variances because, after *Booker*, parties are "inherently on notice" of all potential grounds for a non-Guidelines sentence under Section 3553(a). J.A. 399-400. That holding echoed the district court's conclusion that Rule 32 is "out the window" after *Booker*. *Id.* at 377. Of course, the court of appeals was correct that the defense counsel and the prosecutor "know" that there are hundreds or thousands of factors that might lead a district judge to choose a sentence outside the Guidelines

range. But the same was true under the mandatory Guidelines regime, and it was precisely that situation that led to this court's decision in *Burns*. In that case, the defendant was "inherently" on notice of Chapters 4 and 5 of the Sentencing Guidelines, which set out a wide range of permissible grounds for departure. *United States v. Atencio*, 476 F.3d 1099, 1104 (10th Cir. 2007) (although defendants are "constructively 'on notice' of § 3553(a) factors post-*Booker*," they were "equally aware of the specified circumstances for departure under the Guidelines" under the pre-*Booker* regime); *United States v. Cousins*, 469 F.3d 572, 580 (6th Cir. 2006). Such generalized notice did not sway the Court in *Burns*, and it should not alter the analysis here.

To the contrary, the need for notice is even more acute after *Booker* because that decision exponentially expanded the universe of reasons that a district court may give for sentencing outside the Guidelines range. In *Burns*, the Court reasoned that "[b]ecause the Guidelines place essentially no limit on the number of potential factors that may warrant a departure, no one is in a position to guess when or on what grounds a district court might depart, much less to 'comment' on such a possibility in a coherent way." 501 U.S. at 136-37 (citation omitted). After *Booker*, however, a district court's discretion is even broader. Section 3553(a) lists broad factors such as "the nature and circumstances of the offense," the "history and characteristics of the defendant," and the need "to protect the public," 18 U.S.C. § 3553(a)(1), (a)(2)(C) (2008), which serve as

springboards to a wide range of relevant sentencing considerations. In addition, after *Booker*, a district court is free to impose a non-Guidelines sentence based on factors such as age, education, or family ties, that were generally discouraged under the Guidelines, *Rita*, 127 S. Ct. at 2473, and on "policy considerations, including disagreements with the Guidelines," *Kimbrough v. United States*, 128 S. Ct. 558, 570 (2007).

The greater number of permissible reasons for imposing a non-Guidelines sentence makes it even more difficult for counsel to "guess" the district court's contemplated grounds and to offer "coherent" commentary on those grounds at sentencing. *See United States v. Davenport*, 445 F.3d 366, 371 (4th Cir. 2006) (reasoning that "[t]he need for such notice is as clear now as before *Booker*" because "[t]here is 'essentially no limit on the number of potential factors that may warrant a departure' or a variance") (quoting *Burns*, 501 U.S. at 136-37).

A recent amendment to Rule 32 confirms the error of the court of appeals' view. On December 1, 2007, Rule 32(d)(2)(F) was amended to provide that a district court may "require[]" the probation officer to ensure that the PSR contains "information relevant to the factors under 18 U.S.C. § 3553(a)." Under the court of appeals' approach, however, such information should never be necessary in the PSR because the defendant is already "inherently" on notice of every imaginable ground for an above-Guidelines sentence under *Booker*. As amended, Rule 32 therefore presupposes that

Section 3553(a) does not, of its own force, provide constructive notice to criminal defendants of how the factors might apply in their case.

2. Other courts have reasoned that Rule 32(h) cannot extend to non-Guidelines sentences under *Booker* because the term "departure" refers only to sentences calculated using the explicit "departure" provisions of Chapters 4 and 5 of the Guidelines. *See, e.g.*, *United States v. Mejia-Huerta*, 480 F.3d 713, 722 (5th Cir. 2007), *petition for cert. filed*, No. 06-1381 (Apr. 18, 2007). That contention is mistaken.

By its terms, Rule 32(h) applies to every "departure" from the Guidelines. That word ordinarily means any divergence or deviation from a rule.[5] Because a sentence above the Guidelines range after *Booker* fits that definition, it falls within the ordinary meaning of Rule 32(h).

It is true that, at the time *Burns* was decided and Rule 32(h) was enacted, the term "departure" generally referred to a non-Guidelines sentence imposed for a reason specified in the Guidelines themselves. *See* U.S.S.G. ch. 5, pt. K. The Sentencing Commission had made clear, however, that because its list of possible grounds for departure was "not exhaustive," there were "different

---

[5] *See* Webster's Third New International Dictionary of the English Language 604 (1993) (defining "departure" as a "deviation or divergence esp. from a rule, course of action, plan, or purpose"); American Heritage Dictionary of the English Language 487 (4th ed. 2000) (defining "departure" as "[a] divergence or deviation, as from an established rule, plan, or procedure").

kinds of departure," including a category of "unguided" departures based on "grounds not mentioned in the guidelines." U.S.S.G. ch. 1, pt. A4(b). It was this category of departure that led the Court in *Burns* to conclude that "the Guidelines place essentially no limit on the number of potential factors that may warrant a departure." 501 U.S. at 136. Against that backdrop, there is no reason to believe that, by using the term "departure," the Court in *Burns* or the drafters of Rule 32(h) intended to *exclude* from the notice requirement any category of non-Guidelines sentence—least of all on the theory that it was "not mentioned in the guidelines." As this Court observed in *Burns*, "not every silence is pregnant." 501 U.S. at 136 (quoting *State of Illinois Dept. of Pub. Aid v. Schweiker*, 707 F.2d 273, 277 (7th Cir. 1983)).

II. THE DISTRICT COURT'S FAILURE TO PROVIDE REASONABLE NOTICE BEFORE IMPOSING AN ABOVE-GUIDELINES SENTENCE REQUIRES A NEW SENTENCING HEARING

The Government concedes that the district court erred by failing to provide reasonable notice of the contemplated grounds for its above-Guidelines sentence. Gov't Br. in Opp. 13. It contends, however, that the error was harmless because it "had no impact on the outcome of petitioner's sentencing proceeding." *Id.* The court of appeals did not reach that question, and this Court should remand rather than consider it in the first instance.

In any event, the Government's contention is mistaken. As the transcript of the competency hearing indicates, defense counsel had available expert evidence challenging the sole basis for the district court's decision to enter a sentence above the Guidelines range, and he would have introduced that evidence at sentencing if he had received reasonable notice.

1. Because the court of appeals held that the district court committed no error, J.A. 399, it did not reach the question whether the lack of notice was prejudicial to Mr. Irizarry. Under those circumstances, this Court's "normal practice" is to "remand th[e] case to the Court of Appeals for it to consider in the first instance whether the . . . error was harmless." *Neder v. United States*, 527 U.S. 1, 25 (1999); *see Carella v. California*, 491 U.S. 263, 266-67 (1989). The Court followed that approach in *Burns*, where the parties briefed the harmless-error question, *see* Br. for Petitioner, *Burns v. United States*, No. 89-7260, at 37-42, but the Court elected to remand for further proceedings without deciding whether the error was prejudicial, *see Burns*, 501 U.S. at 133.[6]

Remand is particularly appropriate in this case because otherwise this Court would have to resolve precisely the due process question it sought to avoid in *Burns*. In this case, Mr. Irizarry promptly objected to the lack of notice, J.A.

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[6] The court of appeals in *Burns* then vacated the sentence and remanded to the district court for resentencing. *United States v. Burns*, 946 F.2d 1567 (D.C. Cir. 1991) (Table).

377, so the error may be disregarded only if it did not affect his substantial rights. Fed. R. Crim. P. 52(a); *United States v. Olano*, 507 U.S. 725, 734 (1993). If "notice in this setting is mandated by the Due Process Clause"—an issue the Court in *Burns* scrupulously avoided, 501 U.S. at 138—then the error in this case is constitutional in nature, and the Government bears the burden of proving harmlessness beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967).[7] As shown below, the Government cannot possibly prevail under the harmless beyond a reasonable doubt standard. And if the Court were to review the record for harmlessness under a less rigorous standard, it could only do so after resolving the serious constitutional question avoided in *Burns*. Rather than reaching out to resolve the due process question, this Court should remand for the court of appeals to consider in the first instance whether the failure to provide notice warrants a new sentencing hearing.

---

[7] Indeed, two courts of appeals, including the court below, have held that because "the right to prior notice of the grounds for an upward departure implicates the due process clause of the Fifth Amendment," a violation of the rule announced in *Burns* is constitutional error subject to the standard articulated in *Chapman*. *United States v. Paslay*, 971 F.2d 667, 674 (11th Cir. 1992); *accord United States v. Lopreato*, 83 F.3d 571, 577 (2d Cir. 1996). Two other courts of appeals have reserved the question. *See United States v. Calzada-Maravillas*, 443 F.3d 1301, 1307 n.3 (10th Cir. 2006); *United States v. Himler*, 355 F.3d 735, 743 (3d Cir. 2004).

2. If the Court reaches the question, a new sentencing hearing is warranted because the record demonstrates that the lack of notice was prejudicial in this case. The district court entered the maximum possible sentence under the statute, outside the Guidelines range, based on a conclusion that Petitioner would continue "in this conduct regardless of what this court does and regardless of what kind of supervision he is under." J.A. 374. As the court of appeals recognized, future dangerousness was the sole basis for the district court's selection of a sentence above the Guidelines range. *Id.*; *see* 18 U.S.C. § 3553(a)(2)(C) (2008).

Yet the district court's conclusion about Mr. Irizarry's future dangerousness went entirely untested at the sentencing hearing. With reasonable notice of the contemplated grounds for sentencing above the Guidelines range, Mr. Irizarry's counsel could have introduced expert testimony demonstrating: (1) that Mr. Irizarry's threats against his ex-wife were fueled by his mental illness; (2) that his symptoms, including his paranoid ideations, could be successfully treated through antipsychotic medications and psychotherapy; and (3) that alternative forms of supervision—so long as they included long-term psychiatric treatment—would be preferable to incarceration, which is likely to *increase* his delusional ideations. The Court need not speculate about whether such evidence was available because those were precisely the conclusions reached by the expert witness for the defense, whose comments on future dangerousness at the competency

hearing were disallowed by the district court. J.A. 188-89. Because the record reveals that there was available evidence undermining the court's conclusion about Mr. Irizarry's future dangerousness, there is no doubt that with proper notice defense counsel would have challenged the sole ground for the district court's unannounced variance from the Guidelines.

The Government contends (Br. in Opp. 14) that the error is harmless because the PSR described Petitioner's conduct, and the district court relied on the offense conduct in determining future dangerousness. In *Burns*, however, there was no dispute that the PSR contained a full description of the offense conduct that served as the basis of the district court's upward departure. *See* Br. for Petitioner, *Burns v. United States*, No. 89-7260, at 37-38. This Court nonetheless held that notice of the particular grounds for departure is essential to the full and fair adversarial testing of the grounds for the sentence, emphasizing that counsel is in no position "to guess when or on what grounds a district court might depart." *Burns*, 501 U.S. at 136-37. Accordingly, courts of appeals have "reject[ed] the government's contention that, because the PSR contained a full recitation of the defendant's criminal conduct, this put defendant on notice of the factors on which the court relied for the upward departure." *United States v. Mangone*, 105 F.3d 29, 35 (1st Cir. 1997); *see Calzada-Maravillas*, 443 F.3d at 1301; *United States v. Carter*, 203 F.3d 187, 190-91 (2d Cir. 2000); *United States v. Nuno-Para*, 877 F.2d 1409, 1415 (9th Cir. 1989).

The Government also attempts to gloss over the prejudice in this case by noting that the sentence was "only nine months higher than the top of the advisory Guidelines range." Br. in Opp. 14. Mr. Irizarry, however, is prejudiced by any erroneous increase in his prison sentence, even if it lasts "only" nine months. *See Glover v. United States*, 531 U.S. 198, 203 (2001) (rejecting the suggestion that "a minimal amount of additional time in prison cannot constitute prejudice"). Although the upward variance in this case was not especially large in absolute terms, it was significant relative to the Guidelines range and the statutory maximum. A rule that looked only to the size of the variance would have the effect of insulating sentencing errors from review in cases involving shorter sentences and low statutory maximums. Because the record demonstrates that Mr. Irizarry could have presented expert evidence challenging the sole basis for the district court's above-Guidelines sentence, the Government cannot demonstrate that the error in this case was harmless.

* * *

CONCLUSION

The judgment of the court of appeals should be reversed and remanded for further proceedings.

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February 21, 2008

STATUTORY APPENDIX

1. The Fifth Amendment to the United States Constitution provides in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law."

2. Section 3553(a) of Title 18 of the United States Code provides in relevant part:

> The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
>
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed—
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the Guidelines—

* * *

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission . . .

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a).

3. Rule 32 of the Federal Rule of Criminal Procedure provides in relevant part:

(c) Presentence Investigation.

(1) Required Investigation.

(A) In General.

The probation officer must conduct a presentence investigation and submit a report to the court before it imposes sentence unless:

(i) 18 U.S.C. § 3593(c) or another statute requires otherwise; or

(ii) the court finds that the information in the record enables it to meaningfully exercise its sentencing authority under 18 U.S.C. § 3553, and the court explains its finding on the record.

* * *

(2) Interviewing the Defendant.

The probation officer who interviews a defendant as part of a presentence investigation must, on request, give the defendant's attorney notice and a reasonable opportunity to attend the interview.

(d) Presentence Report.

(1) Applying the Advisory Sentencing Guidelines. The presentence report must:

(A) identify all applicable guidelines and policy statements of the Sentencing Commission;

(B) calculate the defendant's offense level and criminal history category;

(C) state the resulting sentencing range and kinds of sentences available;

(D) identify any factor relevant to:

(i) the appropriate kind of sentence, or

(ii) the appropriate sentence within the applicable sentencing range; and

(E) identify any basis for departing from the applicable sentencing range.

(2) Additional Information. The presentence report must also contain the following information:

(A) the defendant's history and characteristics, including:

(i) any prior criminal record;

(ii) the defendant's financial condition; and

(iii) any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in correctional treatment;

(B) verified information, stated in a nonargumentative style, that assesses the financial, social, psychological, and medical impact on any individual against whom the offense has been committed;

(C) when appropriate, the nature and extent of nonprison programs and resources available to the defendant;

(D) when the law provides for restitution, information sufficient for a restitution order;

(E) if the court orders a study under 18 U.S.C. § 3552(b), any resulting report and recommendation; and

(F) any other information that the court requires, including information relevant to the factors under 18 U.S.C. § 3553(a).

(3) Exclusions.

The presentence report must exclude the following:

(A) any diagnoses that, if disclosed, might seriously disrupt a rehabilitation program;

(B) any sources of information obtained upon a promise of confidentiality; and

(C) any other information that, if disclosed, might result in physical or other harm to the defendant or others.

(e) Disclosing the Report and Recommendation.

(1) Time to Disclose.

Unless the defendant has consented in writing, the probation officer must not submit a presentence report to the court or

disclose its contents to anyone until the defendant has pleaded guilty or nolo contendere, or has been found guilty.

(2) Minimum Required Notice.

The probation officer must give the presentence report to the defendant, the defendant's attorney, and an attorney for the government at least 35 days before sentencing unless the defendant waives this minimum period.

(3) Sentence Recommendation.

By local rule or by order in a case, the court may direct the probation officer not to disclose to anyone other than the court the officer's recommendation on the sentence.

(f) Objecting to the Report.

(1) Time to Object.

Within 14 days after receiving the presentence report, the parties must state in writing any objections, including objections to material information, sentencing guideline ranges, and policy statements contained in or omitted from the report.

(2) Serving Objections.

An objecting party must provide a copy of its objections to the opposing party and to the probation officer.

(3) Action on Objections.

After receiving objections, the probation officer may meet with the parties to discuss the objections. The probation officer may then investigate further and revise the presentence report as appropriate.

(g) Submitting the Report.

At least 7 days before sentencing, the probation officer must submit to the court and to the parties the presentence report and an addendum containing any unresolved objections, the grounds for those objections, and the probation officer's comments on them.

(h) Notice of Possible Departure From Sentencing Guidelines.

Before the court may depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure.

(i) Sentencing.

(1) In General. At sentencing, the court:

(A) must verify that the defendant and the defendant's attorney have read and dis-

cussed the presentence report and any addendum to the report;

(B) must give to the defendant and an attorney for the government a written summary of—or summarize in camera—any information excluded from the presentence report under Rule 32(d)(3) on which the court will rely in sentencing, and give them a reasonable opportunity to comment on that information;

(C) must allow the parties' attorneys to comment on the probation officer's determinations and other matters relating to an appropriate sentence; and

(D) may, for good cause, allow a party to make a new objection at any time before sentence is imposed.

(2) Introducing Evidence; Producing a Statement. The court may permit the parties to introduce evidence on the objections. If a witness testifies at sentencing, Rule 26.2(a)-(d) and (f) applies. If a party fails to comply with a Rule 26.2 order to produce a witness's statement, the court must not consider that witness's testimony.

(3) Court Determinations. At sentencing, the court:

(A) may accept any undisputed portion of the presentence report as a finding of fact;

(B) must—for any disputed portion of the presentence report or other contro-

verted matter—rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing; and

(C) must append a copy of the court's determinations under this rule to any copy of the presentence report made available to the Bureau of Prisons.

(4) Opportunity to Speak.

(A) By a Party. Before imposing sentence, the court must:

(i) provide the defendant's attorney an opportunity to speak on the defendant's behalf;

(ii) address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence; and

(iii) provide an attorney for the government an opportunity to speak equivalent to that of the defendant's attorney.

(B) By a Victim. Before imposing sentence, the court must address any victim of a crime of violence or sexual abuse who is present at sentencing and must permit the victim to speak or submit any information about the sentence. Whether or not the victim is present, a victim's right to address the court may be exercised by the following persons if present:

(i) a parent or legal guardian, if the victim is younger than 18 years or is incompetent; or

(ii) one or more family members or relatives the court designates, if the victim is deceased or incapacitated.

(C) In Camera Proceedings. Upon a party's motion and for good cause, the court may hear in camera any statement made under Rule 32(i)(4).

Fed. R. Crim. P. 32(c)-(i).

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3-24-08

No. 06-7517

In the Supreme Court of the United States

RICHARD IRIZARRY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether Federal Rule of Criminal Procedure 32 requires a district court to provide the parties with notice before varying under 18 U.S.C. 3553(a) from the advisory Sentencing Guidelines range based on a ground not identified in the presentence report or the parties' submissions.

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In the Supreme Court of the United States

No. 06-7517

RICHARD IRIZARRY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (J.A. 392-400) is reported at 458 F.3d 1208.

JURISDICTION

The judgment of the court of appeals was entered on August 1, 2006. The petition for a writ of certiorari was filed on October 26, 2006. The petition was granted on January 4, 2008. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

The relevant constitutional provisions, statutes, and rules are reprinted in an appendix (App., *infra*, 1a-18a) to this brief.

STATEMENT

Following a guilty plea, petitioner was convicted in the United States District Court for the Southern District of Alabama of making a threatening interstate communication, in violation of 18 U.S.C. 875(c). He was sentenced to five years of imprisonment, to be followed by three years of supervised release. J.A. 382, 384. The court of appeals affirmed his sentence. J.A. 392-400.

1. In May 2004, a grand jury in the Southern District of Alabama charged petitioner with 15 counts of making a threatening interstate communication, in violation of 18 U.S.C. 875(c). J.A. 19-22. Petitioner pleaded guilty to one of the counts, which alleged that, on November 5, 2003, he transmitted an interstate e-mail threatening to kill or injure his ex-wife and her new husband. *Ibid.*; J.A. 272-276.

In the factual resumé accompanying his plea, petitioner acknowledged that his ex-wife had custody of their two children and that he was "permanently" restrained from contacting her or the children and from "physically abusing, molesting or harassing [them] in any way." J.A. 274. He also admitted that he "knowingly and willfully" transmitted across state lines the e-mail threatening to kill his ex-wife and her new husband. J.A. 273-274. The subject heading on the e-mail was "You have been warned for the very last time for my patience is gone!" J.A. 273. The text stated in part:

> Books have you read any lately? I have one in particular on how to make bombs for who knows if i have reason to level something. * * * [T]hink it over for when the gun is aim and the blood begins to pour it is then to late. * * * Leah or whom ever are you willing to die for what you believe as i am? * * * I

> see the future i have wanted to avoid now but this is the only way. No parents is what you children will have. * * * Leah i hope you have a better plan for i am coming and you will answer. You and Kim crying before me and we will see which of you chooses who over the other when i take aim!

J.A. 273-274. Petitioner admitted that he had sent "dozens of other similar e-mails" threatening his ex-wife, her new husband, her mother, and others. J.A. 275. He acknowledged that he intended the e-mails "to convey true threats to kill or injure" those people. *Ibid.* The district court accepted petitioner's guilty plea. J.A. 277.

2. a. Several months before accepting petitioner's plea, the district court held a hearing to determine whether petitioner was competent to stand trial. J.A. 25-259. Four witnesses testified—petitioner; K. Lyn Hillman, petitioner's counsel at that time;[1] Dr. Rodolfo Buigas, a forensic psychologist who testified as an expert for the government; and Dr. Thomas S. Bennett, a psychologist who testified as an expert for the defense. *Ibid.* The court also received psychiatric reports from both Dr. Buigas and Dr. Bennett. J.A. 2.

Petitioner testified that he made the threats against his ex-wife and others in retaliation for acts they committed against him, including purportedly mistreating his children and preventing him from seeing them. J.A. 33-34, 66-67. Hillman testified that petitioner did not believe he was mentally ill. J.A. 238. She also testified that, although petitioner believed his claims that his wife had threatened him, was involved with the Ku Klux Klan, and was abusing the children, those claims "were

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[1] Ms. Hillman withdrew as defense counsel before sentencing, and the court appointed new counsel. J.A. 4.

not true." J.A. 265; see J.A. 232-234. Hillman also stated that petitioner had "indicated if he was sentenced to five years, when he got out, he would kill his ex-wife, he would also kill his children, and kill her boyfriend." J.A. 239.

Dr. Buigas diagnosed petitioner as having an anxiety disorder and a borderline personality disorder with paranoid and antisocial features. J.A. 126, 128. Dr. Buigas concluded that petitioner did not have a "serious mental illness," see Forensic Evaluation by Dr. Rodolfo Buigas 9 (Apr. 28, 2004) (Buigas Report), and that he was competent to stand trial, J.A. 147. Dr. Buigas further concluded that petitioner's personality disorder was "long-standing," "characterological," and "resistant to change." Buigas Report 10-11. Dr. Buigas disagreed with defense expert Dr. Bennett, who diagnosed petitioner with a delusional disorder that would interfere with his ability to assist his attorney. J.A. 135, 175, 186. Dr. Bennett also reported that petitioner "has apparently not been tried on antipsychotic medications, which may well improve his thinking." Psychological Evaluation by Dr. Thomas S. Bennett 5 (Feb. 6, 2004) (Bennett Report). Dr. Buigas agreed that if, contrary to his own view, petitioner was delusional, antipsychotic medications "could mitigate" delusional symptoms. J.A. 146.

The district court found that Dr. Buigas's diagnosis of petitioner's mental condition was more likely correct than Dr. Bennett's. J.A. 267. The court found that petitioner was not suffering from "delusions" and that his mental condition was "longstanding and not likely to change." J.A. 268-269. Accordingly, the court determined that petitioner was "not incompetent to stand trial or to plead guilty." J.A. 267.

b. After petitioner pleaded guilty but before his sentencing, the district court ordered his examination by the Bureau of Prisons to determine whether he required treatment in a special facility. J.A. 288-290. The report from the Butner Federal Medical Center (FMC) concluded that petitioner could be treated in a prison facility. See Forensic Evaluation by Butner FMC 14 (Feb. 7, 2005) (Butner FMC Report). The FMC reported, however, that he had declined psychiatric medication and that he "currently is not motivated to engage in any treatment." *Ibid.*; see *id.* at 11. The FMC concluded that, "if released to the community, [petitioner] would pose a risk of harm to his ex-wife and anyone associated with her, as well [as] possibly his children." *Id.* at 14.

3. Before petitioner was sentenced, this Court decided *United States* v. *Booker*, 543 U.S. 220 (2005). To remedy a Sixth Amendment violation in mandatory Guidelines, *Booker* held that the federal Sentencing Guidelines must be treated as "effectively advisory." *Id.* at 245. Before *Booker*, a federal district court could not depart from the Guidelines sentencing range except in limited circumstances described generally in 18 U.S.C. 3553(b) (2000 & Supp. V 2005) and set out in detail in the Sentencing Guidelines, see Guidelines § 4A1.3, Ch. 5, Pts. H and K (2004). After *Booker*, district courts may sentence outside the Guidelines range not only when authorized by the Guidelines but whenever warranted by the general sentencing criteria in 18 U.S.C. 3553(a) (2000 & Supp. V 2005). See *Booker*, 543 U.S. at 245. Those criteria include, among other things, the need for the sentence imposed to "protect the public from further crimes of the defendant." 18 U.S.C. 3553(a)(2)(C).

4. The presentence report (PSR) prepared for petitioner's sentencing identified his ex-wife as the primary

victim of his offense. J.A. 406. The PSR stated that she and petitioner were divorced after she claimed that he had physically abused her and threatened their children. J.A. 404, 411. The PSR noted that the judge presiding over the divorce had found that petitioner "is imminently capable of carrying out his threats" and had issued an order restraining petitioner from contacting his ex-wife and their children. J.A. 411. The PSR also recounted the expert testimony from the competency hearing. J.A. 412-413.

The PSR further noted that the 15 e-mails charged in the May 2004 indictment would be provided to the court with the PSR. J.A. 405. The government had provided the e-mails to petitioner at arraignment. See Letter from United States Attorney David P. York (Jan. 22, 2004). In the e-mails, petitioner made repeated and graphic threats against his ex-wife, his children, his ex-wife's new husband, her friends, and her mother; he recounted details of his efforts to track down his ex-wife; and he warned that his patience was wearing thin and he was about to act. J.A. 420-448.

In calculating petitioner's offense level under the Sentencing Guidelines, the PSR recommended several enhancements, including one premised on evidence that petitioner intended to carry out the threats in his e-mails. J.A. 407. The PSR also recommended against a downward adjustment to petitioner's offense level for acceptance of responsibility. J.A. 406. In support, the PSR noted that petitioner's cellmate had indicated that, while petitioner was detained following his arrest, he had solicited the cellmate to kill his ex-wife's new husband. *Ibid.* Based on that evidence, the PSR concluded that petitioner "continues to engage in, or attempt to engage in, criminal activity." *Ibid.*

In calculating petitioner's criminal history category, the PSR determined that several of his past crimes could not count toward his criminal history score. Those crimes included petitioner's 2001 violation of the order restraining him from contacting his ex-wife and their children. That conviction was not counted because petitioner had not been represented by counsel. J.A. 410. Petitioner's past abuse of his ex-wife and his attempt to hire someone to kill her new husband were also not included in his criminal history. See J.A. 407-411.

The PSR calculated petitioner's Guidelines sentencing range as 41 to 51 months of imprisonment. J.A. 415. The offense carried a statutory maximum of five years of imprisonment. *Ibid.* In a section entitled "Factors That May Warrant Departure," the PSR stated:

> Pursuant to Guideline 4A1.3 (Adequacy of Criminal History Category), the Court may consider whether or not the defendant's criminal history category adequately reflects the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes. If not, the Court may consider imposing a sentence departing from the otherwise applicable guideline range.

J.A. 417.

Petitioner objected to the recommended enhancement based on his intent to carry out his threats, the denial of an acceptance of responsibility adjustment, and the PSR's description of his criminal history. J.A. 295-296, 300-301. The government had no objections to the PSR but gave notice that petitioner's ex-wife would testify at the sentencing hearing. J.A. 293.

5. In March 2005, the district court held petitioner's sentencing hearing. J.A. 298-380. Petitioner's ex-wife

testified that, during their marriage, petitioner had repeatedly abused and threatened her and their children. J.A. 305-310. She described how they had fled from California, where they lived with petitioner, to South Carolina, where she obtained a divorce and a restraining order. *Ibid.* She testified that petitioner was arrested in 2001 for violating the restraining order, after he drove cross-country in a van containing a hammer, rope, tarps, and duct tape, and showed up at her apartment in South Carolina. J.A. 321-322. She stated that she and the children then moved to Mobile, Alabama, where she remarried. J.A. 311-312. Nonetheless, she explained, petitioner continued to threaten her. He sent her 255 e-mails, many of which contained graphic threats to kill or injure her, the children, her new husband, her mother, and her friends. J.A. 312-314, 318. Petitioner also called his ex-wife's home in Mobile and sent her new husband a card with a Mobile postmark. J.A. 316-318. Petitioner's ex-wife testified that she was "certain" that petitioner was "bound and determined to kill, harm, or at minimum terrorize" her, her family, and her friends. J.A. 320. She told the court that petitioner "w[ould] not stop unless he [was] forced to stop," and she asked the court to "[p]lease force him to stop." *Ibid.*

An FBI agent also testified at the hearing. J.A. 323-333. The agent stated that, when petitioner was arrested, his automobile contained numerous items indicating his intent to track down his ex-wife and her family. J.A. 326-329. The agent testified that, after petitioner's arrest, he made violent threats against his ex-wife and others. J.A. 329-330. In particular, he stated that he intended "to shoot, car bomb, or decapitate [his ex-wife] and her family and to 'leave a trail of blood from here to Alabama' to protect his kids." J.A. 394.

Petitioner's cellmate also testified. J.A. 333-347. According to the cellmate, petitioner had stated that he intended to kill or to hire someone to kill his ex-wife's new husband. J.A. 336-338. The cellmate also testified that petitioner threatened to kidnap his children and to kill his ex-wife's mother, whom he blamed for his separation from his ex-wife. *Ibid.*

Petitioner testified at the sentencing hearing as well. J.A. 347-364. He denied many of the alleged incidents of past abuse. J.A. 360-362. He denied that he intended to carry out the threats he had made in the past or that his ex-wife and the children were "in any jeopardy" from him in the future. J.A. 354, 359, 361-362. He also denied his cellmate's claims. J.A. 356-357.

After hearing argument from counsel, the district court overruled petitioner's objections to the PSR. J.A. 370-372. The court found that petitioner "did in fact intend and does have a current intent" to carry out his threats. J.A. 371. And, in denying an adjustment for acceptance of responsibility, the court reiterated that petitioner "still intends to threaten and to terrorize [his ex-wife] by whatever means he can." J.A. 371-372.

Although the government requested a sentence at the high-end of the advisory Guidelines range, the district court sentenced petitioner to the statutory maximum of five years of imprisonment, nine months above the top of the range. J.A. 373-375. The court stated that it had concluded that "the guideline range [was] not appropriate" because the court was "sincerely convinced that [petitioner] w[ould] continue, as his ex-wife testified, in this conduct regardless of what this court does and regardless of what kind of supervision he's under." J.A. 374. Accordingly, the court concluded, "the maxi-

mum time" that petitioner could be "incapacitated" was "best for society." *Ibid.*

Petitioner objected that the court had not given notice of its intent to impose an "upward departure" from "the applicable guideline range." J.A. 377. The court overruled the objection, observing that petitioner was on "notice that the guidelines were only advisory and the court could sentence anywhere within the statutory range as defined by the United States Code." *Ibid.*

6. The court of appeals affirmed petitioner's sentence. J.A. 392-400. The court noted that Federal Rule of Criminal Procedure 32(h), which codified the holding in *Burns* v. *United States*, 501 U.S. 129 (1991), states that, before a sentencing court "may depart from the applicable sentencing range on a ground not identified for departure either in the [PSR] or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure." J.A. 397 (quoting Fed. R. Crim. P. 32(h)). The court of appeals determined, however, that the above-Guidelines sentence in this case was "not a guidelines departure" but a "variance" (J.A. 398), based on the district court's consideration of the sentencing criteria in 18 U.S.C. 3553(a) (2000 & Supp. V 2005), "particularly the need to protect the public, including [petitioner's] ex-wife, from further crimes of [petitioner]." J.A. 400; see J.A. 399 (citing 18 U.S.C. 3553(a)(2)(C)).

The court of appeals then considered whether Rule 32's notice requirement applies "to a sentence set outside the advisory guidelines range based not on the guidelines' departure provisions, but on a district court's consideration of the section 3553(a) factors." J.A. 399. The court of appeals concluded that the notice requirement "does not apply to such variances." *Ibid.* The

court reasoned that, "[a]fter *Booker*, parties are inherently on notice that the sentencing guidelines range is advisory and that the district court must consider the factors expressly set out in section 3553(a) when selecting a reasonable sentence between the statutory minimum and maximum. Given *Booker*, parties cannot claim unfair surprise or inability to present informed comment—the Supreme Court's concerns in *Burns*—when a district court imposes a sentence above the guidelines range based on the section 3553(a) sentencing factors." J.A. 399-400 (internal citation omitted).

SUMMARY OF ARGUMENT

I. A. In *Burns* v. *United States*, 501 U.S. 129 (1991), this Court held that Federal Rule of Criminal Procedure 32 required the district court to provide notice before departing from the sentencing range specified by the Sentencing Guidelines on a ground not identified in the presentence report or the parties' submissions. In 2002, Rule 32 was amended to codify *Burns*. The amendment retained the language on which the Court had relied in *Burns*, see Fed. R. Crim. P. 32(i)(1)(C), and added a new subsection. That subsection provides that, "[b]efore the court may depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure." Fed. R. Crim. P. 32(h).

B. The notice requirement of Rule 32(h) applies to all deviations—*i.e.*, departures—from the Guidelines range, whether authorized by the Guidelines or Section 3553(a). The ordinary meanings of "depart" and "depar-

ture" include any variance or deviation. The Guidelines generally define a "departure" as the "imposition of a sentence outside the applicable guideline range or of a sentence that is otherwise different from the guidelines sentence," Guidelines § 1B1.1, comment. (n.1(E)), a definition that comfortably includes variances under Section 3553(a). And several courts have referred to Section 3553(a) variances as "departures"—including this Court, which has used the terms "departure" and "variance" interchangeably. As enacted, Rule 32(h) required notice of all available deviations from the Guidelines range, and it should be construed the same way today. Although only Guidelines-authorized departures were permissible when Rule 32(h) was enacted, courts may now also vary from the Guidelines based on Section 3553(a). Variances thus fall squarely within the plain meaning of the textual reference to departures. Accordingly, Rule 32(h) requires notice of Section 3553(a) variances.

C. That interpretation is supported by Federal Rule of Criminal Procedure 32(i)(1)(C), which gives the parties the right to comment on "matters relating to an appropriate sentence." In *Burns*, this Court reasoned that this right would be virtually meaningless without notice of *sua sponte* departures. 501 U.S. at 136. That reasoning applies with equal force to *sua sponte* variances. Like Guidelines departures, Section 3553(a) variances are "[o]bviously" matters relating to the appropriate sentence, and, "it makes no sense to impute to Congress an intent that a defendant have the right *to comment* on the appropriateness of a *sua sponte* [variance] but not the right *to be notified* that the court is contemplating such a ruling." *Id.* at 135-136.

D. For similar reasons, a notice requirement for variances is essential to advance Rule 32's purpose of

ensuring "focused, adversarial resolution of the legal and factual issues" relevant to sentencing. *Burns*, 501 U.S. at 137. Notice of variances is even more necessary to further this purpose than notice of departures, because the Section 3553(a) criteria embrace a wider array of factors than the grounds for departure under the Guidelines. In addition, a sentencing court can always use a Section 3553(a) variance to impose the same sentence that the court could have imposed as a Guidelines departure. Therefore, unless a court must provide notice of otherwise unanticipated grounds for variances, courts could bypass Guidelines departures and impose all non-Guidelines sentences as Section 3553(a) variances, with no notice. And, if a court imposed a Guidelines departure without giving notice, that error would often be harmless. Courts frequently impose non-Guidelines sentences both on traditional departure grounds and as Section 3553(a) variances, and a failure to give notice of a traditional departure would be harmless if the court would have imposed the same sentence under Section 3553(a).

E. Construing Rule 32 to mandate notice of variances would also have the salutary effect of eliminating the need for courts to consider whether notice would otherwise be required by due process. The question whether due process demands notice before a *sua sponte* variance from the advisory Guidelines range is less serious than the question in *Burns*, which involved a departure from a mandatory Guidelines range. Nonetheless, avoiding the issue provides further support for interpreting Rule 32 as mandating notice of variances.

F. None of the reasons courts have offered for limiting Rule 32 to Guidelines departures is persuasive. The fact that a Section 3553(a) variance is always possible

does not eliminate the need for notice. A notice requirement for variances also would not be unduly burdensome. Requiring notice of Section 3553(a) variances is also consistent with post-*Booker* sentencing, because the Guidelines, although advisory, continue to play a central role. And, finally, nothing in the text of Rule 32(h) limits its coverage to departures authorized by the Guidelines themselves.

II. Although the district court erred in imposing an above-Guidelines sentence without giving notice that it was contemplating a variance under Section 3553(a), that error was harmless.

A. This Court should reject petitioner's request that the Court not address the harmless-error issue. The issue is properly presented, and the Court has addressed harmlessness questions in the past. Resolving the issue here will not be overly burdensome and will provide important guidance to the lower courts.

B. Petitioner is not correct that the Court must decide whether notice is required by due process in order to decide the harmless-error issue. The district court's violation of Rule 32 was non-constitutional error, subject to the harmless-error standard of *Kotteakos* v. *United States*, 328 U.S. 750 (1946). That standard applies whether or not the district court also violated due process. Petitioner has never raised a due process claim. And only a separate due process claim, if properly preserved and decided in petitioner's favor, would be reviewed under the more demanding harmless-error standard of *Chapman* v. *California*, 386 U.S. 18 (1967).

C. In any event, the notice deficiency was harmless under both the *Kotteakos* and *Chapman* standards. The district court varied upwards to protect the public from further crimes by petitioner. Although the court did not

give notice that it might vary on that ground, petitioner had notice that the likelihood that he would commit further crimes would be a central issue at sentencing and might support an above-Guidelines sentence. There is no reason to believe that petitioner's sentencing presentation would have been materially different if he had received notice that his future dangerousness might also be considered as the basis for a variance.

D. For the first time in this Court, petitioner claims that, with more specific notice, he would have presented expert testimony that his criminal conduct was the product of a delusional disorder that could be successfully treated. That evidence would not have affected petitioner's sentence. Petitioner made essentially the same argument at sentencing, although he chose not to present expert testimony, which petitioner concedes was "available." Pet. Br. 32-33. Moreover, the district court had already rejected the defense expert's diagnosis that petitioner was delusional. Finally, the evidence at sentencing showed that petitioner had repeatedly refused psychiatric medication and was "not motivated to engage in any treatment." Butner FMC Report 14.

ARGUMENT

I. RULE 32 REQUIRES A DISTRICT COURT TO PROVIDE NOTICE BEFORE VARYING UNDER 18 U.S.C. 3553(a) FROM THE SENTENCING GUIDELINES RANGE BASED ON A GROUND NOT IDENTIFIED IN THE PRESENTENCE REPORT OR THE PARTIES' SUBMISSIONS

Federal Rule of Criminal Procedure 32 requires a district court to provide notice before sentencing outside the range recommended by the Sentencing Guidelines on a ground not previously identified by the presentence report or the parties. That requirement applies to any

deviation from the Guidelines range, whether characterized as a Guidelines departure or a variance under 18 U.S.C. 3553(a) (2000 & Supp. V 2005). The district court therefore erred when it sentenced petitioner above the Guidelines range based on Section 3553(a) without first providing notice.

A. Rule 32(h), Which Codifies The Holding Of *Burns*, Requires Notice Before A *Sua Sponte* "Departure" From The Applicable Guidelines Range

Rule 32 establishes formal sentencing procedures to ensure "focused, adversarial resolution" of the issues central to selecting an appropriate sentence. *Burns* v. *United States*, 501 U.S. 129, 137 (1991). Those procedures generally require preparation of a presentence report (PSR) that sets out the principal legal and factual issues bearing on the sentence. Fed. R. Crim. P. 32(c). The PSR must include the sentencing range recommended by the Guidelines and "identify any basis for departing from" that range. Fed. R. Crim. P. 32(d). The parties must receive copies of the PSR before the sentencing hearing and may file objections to the PSR's factual findings and sentencing recommendations. Fed. R. Crim. P. 32(e) and (f).

In *Burns*, this Court construed an earlier version of Rule 32 to require the sentencing court to give the parties notice before departing from the Guidelines range on a ground that had not been identified by the PSR or the parties' prehearing submissions. 501 U.S. at 138-139. The Court held that notice was implicitly required by Rule 32's mandate that the parties have "an opportunity to comment upon the [PSR] and on other matters relating to the appropriate sentence." *Id.* at 135 (quoting Fed. R. Crim. P. 32(a)(1) (1991)). The Court rea-

soned that, if notice of *sua sponte* departures were not required, the right to comment on those departures, which are "[o]bviously" matters relating to an appropriate sentence, would be "meaningless." *Id.* at 135-136. The Court also reasoned that notice is critical to Rule 32's "purpose of promoting focused, adversarial resolution of the legal and factual issues" relevant to sentencing. *Id.* at 137. Additionally, the Court relied on the principle of constitutional avoidance, explaining that, if it "read Rule 32 to dispense with notice, [the Court] would then have to confront the serious question whether notice in this setting is mandated by the Due Process Clause." *Id.* at 138.

In 2002, Rule 32 was amended to "reflect[]" the decision in *Burns*. Fed. R. Crim. P. 32 advisory committee's notes (2002 Amends.). The amendment retained (with non-substantive revisions) the language on which the Court relied in *Burns* and moved that language to a new subsection, Fed. R. Crim. P. 32(i)(1)(C). The amendment also added Rule 32(h), entitled "Notice of Possible Departure from Sentencing Guidelines." Rule 32(h) states that, "[b]efore the court may depart from the applicable sentencing range on a ground not identified for departure either in the [PSR] or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure." Fed. R. Crim. P. 32(h).

When Rule 32(h) was enacted, the Guidelines were viewed as mandatory. District courts could deviate from the Guidelines sentencing range only under limited circumstances described in 18 U.S.C. 3553(b) (2000 &

Supp. V 2005).[2] The Guidelines contain various provisions detailing when departures are authorized in accordance with that limitation. See Guidelines § 4A1.3, Ch. 5, Pts. H and K (2004). Subsequently, however, this Court decided *United States* v. *Booker*, 543 U.S. 220 (2005), which rendered the Guidelines advisory. Under *Booker*, although the Guidelines continue to play an important role in sentencing, district courts may deviate from the Guidelines range not only when authorized by the Guidelines themselves but also when warranted by the criteria in Section 3553(a). *Booker*, 543 U.S. at 245.

B. The Term "Departure" Encompasses All Deviations From The Guidelines Range, Whether Authorized By The Guidelines Or By Section 3553(a)

After *Booker*, Rule 32's requirement that a district court provide notice before a *sua sponte* "departure" from the Guidelines range is best construed to encompass a deviation from that range authorized by Section 3553(a) as well as a deviation authorized by the Guidelines themselves.

1. The words "depart" and "departure" in Rule 32(h) are best read to encompass all deviations from the Guidelines range, whether authorized by the Guidelines themselves or by Section 3553(a). The ordinary meaning of "depart" is to "deviate" or to "vary, as from a regular course." *Webster's Third New International Dictionary*

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[2] Section 3553(b)(1) states that the sentencing court "shall" impose a sentence within the Guidelines range "unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines that should result in a sentence different from that described." 18 U.S.C. 3553(b)(1) (Supp. V 2005).

of the English Language 604 (1993); *The American Heritage Dictionary of the English Language* 501 (3d ed. 1992); see *Webster's New International Dictionary* 700 (2d ed. 1958) ("deviate"). A "departure" is a "divergence or deviation, as from an established rule, plan, or procedure." *Ibid.*; see *Random House Dictionary of the English Language* 534 (2d ed. 1987). Accordingly, under the plain meaning of the terms "depart" and "departure" in Rule 32(h), a court must give notice whenever it deviates on its own initiative from the applicable Guidelines range, regardless of whether the deviation is authorized by the Guidelines or the broader Section 3553(a) criteria. *United States* v. *Cousins*, 469 F.3d 572, 580 (6th Cir. 2006); *United States* v. *Evans-Martinez*, 448 F.3d 1163, 1167 (9th Cir. 2006).

2. The Guidelines support that understanding of the rule. The Guidelines did not contain a definition of "departure" when Rule 32(h) was enacted. But the Sentencing Commission added its own definition to the Guidelines shortly thereafter. See Guidelines App. C, Amend. 651, Reason for Amend. (Oct. 27, 2003). Under that definition, "departure" generally means "imposition of a sentence outside the applicable guideline range or of a sentence that is otherwise different from the guideline sentence." Guidelines § 1B1.1, comment. (n.1(E)). A non-Guidelines sentence based on the Section 3553(a) factors is clearly a "sentence outside the applicable guideline range" or "a sentence that is otherwise different from the guideline sentence." A deviation from the Guidelines under Section 3553(a) thus fits comfortably within the Guidelines definition of "departure."[3]

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[3] The Guidelines provide a more specific definition of "departure" for purposes of Guidelines § 4A1.3. For that provision, departure means

Although the Guidelines define "departure" broadly, they authorize only certain types of departures—those based on "an aggravating or mitigating circumstance * * * of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines," Guidelines § 5K2.0(a)(1); those based on the defendant's provision of "substantial assistance" to the government, Guidelines § 5K1.1; and those based on a conclusion that "the defendant's criminal history category substantially under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes," Guidelines § 4A1.3(a)(1). When Rule 32(h) was enacted, the Guidelines were mandatory, and those categories of departures were therefore the only ones that were legally authorized. Likewise, they were the only departures for which Rule 32(h) would have required notice. But that does not mean that Rule 32(h) should be construed as limited to those departures now that the Guidelines are advisory and courts have additional bases for sentencing outside the Guidelines range. Cf. *Riegel* v. *Medtronic, Inc.*, 128 S. Ct. 999, 1011-1012 (2008) (Stevens, J., concurring) (finding express preemption in circumstances not envisioned by drafters of preempting provision).

On the contrary, because Rule 32(h) required notice of all sentences outside the presumptively applicable Guidelines range when it was enacted, this Court should give it a comparably comprehensive construction today.

"assignment of a criminal history category other than the otherwise applicable criminal history category, in order to effect a sentence outside the applicable guideline range." Guidelines § 1B1.1, comment. (n.1(E)). That definition is, by its terms, not relevant to non-Guidelines sentences under Section 3553(a).

Rule 32(h) should be read to require notice of any sentence outside the Guidelines range, whether resting on a Guidelines departure factor or the broader set of considerations embraced by Section 3553(a). It may be that, in some cases, like this one, the factors on which the district court varies will be disputed by the parties even absent notice of the potential variance, but that is no reason not to give Rule 32(h) its full scope. That was true in some cases before *Booker*, and, even after *Booker*, courts may deviate based on factors very different from those on which the parties focus.

3. Although the term "departure" in Rule 32(h) is broad enough to encompass non-Guidelines sentences based on Section 3553(a), the government has generally used the term "variance" to refer to those sentences, and it has reserved the term "departure" for deviations authorized by the Guidelines themselves. Several courts of appeals have also adopted that terminology. See, *e.g.*, *United States* v. *Vampire Nation*, 451 F.3d 189, 195 n.2 (3d Cir.), cert. denied, 127 S. Ct. 424 (2006) (citing *United States* v. *Sitting Bear*, 436 F.3d 929, 932-933 (8th Cir. 2006)). That terminology, however, developed only as a convenient way to differentiate the two processes for sentencing outside the Guidelines range. "Variance" is not defined in any statute or rule. The government and the courts could just as easily have called Section 3553(a) variances "non-Guidelines departures." In fact, several courts of appeals have referred to them that way. See, *e.g.*, *Cousins*, 469 F.3d at 577; *United States* v. *Calzada-Maravillas*, 443 F.3d 1301, 1304 (10th Cir. 2006).

In addition, this Court has frequently used the term "departure" to refer to any sentence outside the Guidelines range, including a variance on Section 3553(a)

grounds. See, *e.g.*, *Rita* v. *United States*, 127 S. Ct. 2456, 2464 (2007) (noting that district courts "may depart (either pursuant to the Guidelines or, since *Booker*, by imposing a non-Guidelines sentence)"); *Gall* v. *United States*, 128 S. Ct. 586, 594, 595 (2007) (repeatedly using "departure" to refer to a Section 3553(a) variance). Likewise, the Court has often used the words "departure," "variance," and "deviation" interchangeably to refer to a sentence outside the Guidelines range imposed under Section 3553(a). See, *e.g.*, *id.* at 594-595 ("In reviewing the reasonableness of a sentence outside the Guidelines range, appellate courts may therefore take the degree of *variance* into account and consider the extent of a *deviation* from the Guidelines. We reject, however, an appellate rule that requires 'extraordinary' circumstances to justify a sentence outside the Guidelines range. We also reject the use of a rigid mathematical formula that uses the percentage of a *departure* as the standard for determining the strength of the justifications required for a specific sentence.") (emphases added); *id.* at 597 ("If [the district judge] decides that an outside-Guidelines sentence is warranted, he must consider the extent of the *deviation* and ensure that the justification is sufficiently compelling to support the degree of the *variance*. We find it uncontroversial that a major *departure* should be supported by a more significant justification than a minor one.") (emphases added). Thus, Section 3553(a) variances are readily understood to be "departure[s]" covered by the notice requirement of Rule 32(h).[4]

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[4] Interpreting the term "departure" to include Section 3553(a) variances is also consistent with the use of that term elsewhere in Rule 32. Rule 32(d)(1)(E) provides that the PSR must "identify any basis for departing from the applicable sentencing range." Fed. R. Crim. P.

C. A Notice Requirement Is Also Supported By Rule 32(i)(1)(C), Which Mandates That The District Court Allow The Parties To Comment On "Matters Relating To An Appropriate Sentence"

In *Burns*, this Court concluded that it had to read Rule 32 to require notice of *sua sponte* departures because a contrary reading would "render[] meaningless the parties' express right 'to comment upon . . . matters relating to the appropriate sentence,'" 501 U.S. at 136 (quoting Fed. R. Crim. P. 32(a)(1) (1991)). The Court's reasoning in *Burns* applies with equal force to *sua sponte* variances under Section 3553(a).

Rule 32 continues to give the parties the right "to comment on * * * matters relating to an appropriate sentence." Fed. R. Crim. P. 32(i)(1)(C). Like Guidelines departures, Section 3553(a) variances are "[o]bviously" matters relating to the appropriate sentence. *Burns*, 501 U.S. at 135. And "it makes no sense to impute to Congress an intent that a defendant have the right *to comment* on the appropriateness of a *sua sponte* departure [or variance] but not the right *to be notified* that the court is contemplating such a ruling." *Id.* at 135-136. "'Th[e] right to be heard has little reality or worth unless one is informed' that a decision is contemplated." *Id.* at 136 (citation omitted; brackets in original). Moreover, there is "essentially no limit on the number of potential factors that may warrant" a non-Guidelines sen-

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32(d)(1)(E). It is entirely appropriate to interpret that provision as requiring the PSR to identify grounds for departing under Section 3553(a), as well as under the Guidelines. In fact, after *Booker*, PSRs frequently do just that. See, *e.g.*, *United States* v. *Fancher*, 513 F.3d 424, 425-426 (4th Cir. 2008); *United States* v. *Korson*, 243 Fed. Appx. 141, 143 (6th Cir. 2007); *United States* v. *Hernandez-Felix*, No. 07-10052, 2007 WL 4292110, at *1 (9th Cir. Dec. 5, 2007).

tence under Section 3553(a). *Ibid.* Accordingly, "no one is in a position to guess when or on what grounds a district court might" choose to impose a non-Guidelines sentence, "much less to 'comment' on such a possibility in a coherent way." *Id.* at 137. Requiring advance notice of Section 3553(a) variances thus gives meaning to the right to comment on the decision whether to impose a non-Guidelines sentence. *United States* v. *Anati*, 457 F.3d 233, 236 (2d Cir. 2006).

D. Notice Of All *Sua Sponte* Deviations From The Guidelines Range Is Necessary To Achieve The Purposes Of Rule 32

1. For similar reasons, notice of Section 3553(a) variances is essential to advance the purposes of Rule 32. As this Court explained in *Burns*, Rule 32 seeks to provide "focused, adversarial resolution of the legal and factual issues" relevant to sentencing. *Burns*, 501 U.S. at 137. Rule 32(h) reflects a judgment that the parties cannot meaningfully present evidence and argument on sentencing outside the Guidelines range unless they have notice of the grounds on which the district court is contemplating that it might impose a non-Guidelines sentence. The need for notice is also substantial for Section 3553(a) variances. *United States* v. *Atencio*, 476 F.3d 1099, 1104 (10th Cir. 2007) (en banc).

Burns explains that, absent notice, the parties would be forced to address "possible *sua sponte* departures in a random and wasteful way by trying to anticipate and negate every conceivable ground on which the district court might choose to depart on its own initiative." 501 U.S. at 137. That problem is even more apt to occur if the parties do not have notice of Section 3553(a) variances because the Section 3553(a) criteria are broader

than the grounds for departure under the Guidelines. Compare 18 U.S.C. 3553(a) (2000 & Supp. V 2005) with Sentencing Guidelines § 4A1.3, Ch. 5, Pts. H and K. Moreover, as with *sua sponte* Guidelines departures, "in every case in which the parties fail to anticipate an unannounced and uninvited" Section 3553(a) variance, "a critical sentencing determination will go untested by the adversarial process contemplated by Rule 32." *Burns*, 501 U.S. at 137.

To be sure, that problem is not evident in this case from an *ex post* perspective. The ground on which the district court varied was subject to adversarial dispute both because it was relevant to sentencing within the Guidelines range and because the PSR raised the possibility of a Guidelines departure on a similar ground. See pp. 41-45, *infra*. But there is a potential problem *ex ante* in this and every case, because the parties have no way to know which of the virtually limitless grounds for variance the sentencing judge thinks are relevant.

In *Rita*, this Court recently reaffirmed the continuing importance of the adversarial process in the advisory Guidelines regime. The Court observed that, before a district court decides that a "Guidelines sentence should not apply"—either because a departure is authorized by "the Guidelines themselves" or because the Guidelines sentence "fails properly to reflect § 3553(a) factors"—the court must conduct "the thorough adversarial testing contemplated by federal sentencing procedure." *Rita*, 127 S. Ct. at 2465. In making that point, the Court cited Rule 32(h) and (i)(1)(C), as well as *Burns*, for the "importance of notice and meaningful opportunity to be heard." *Ibid.* *Rita* thus confirms that the notice requirement necessary for the adversarial testing of sentencing issues applies to any sentence outside the Guide-

lines range, whether achieved through a Guidelines departure or a Section 3553(a) variance.

2. A notice requirement for Section 3553(a) variances is critical to prevent evisceration of Rule 32(h)'s notice requirement for Guidelines departures. As described above, the grounds for varying under Section 3553(a) are even broader than the justifications for departing under the Sentencing Guidelines. A sentencing court therefore can always use a Section 3553(a) variance to impose the same sentence that the court could have imposed as a Guidelines departure. See *United States* v. *Smith*, 474 F.3d 888, 893 (6th Cir. 2007); *United States* v. *Mohamed*, 459 F.3d 979, 987 (9th Cir. 2006). Because a Section 3553(a) variance can always substitute for a Guidelines departure, Rule 32(h)'s notice requirement for Guidelines departures would be essentially meaningless if Rule 32 did not also require notice of Section 3553(a) variances.

In light of the functional overlap between variances and Guidelines departures, district courts often rely solely on Section 3553(a) when imposing non-Guidelines sentences, without considering whether the Guidelines would authorize a departure. See, *e.g.*, *United States* v. *Mejia-Huerta*, 480 F.3d 713, 716-719 (5th Cir. 2007), petition for cert. pending, No. 06-1381 (filed Apr. 18, 2007); *United States* v. *Levine*, 477 F.3d 596, 606 (8th Cir.), cert. denied, 127 S. Ct. 3023 (2007). Indeed, two circuits have held that Guidelines departures are obsolete after *Booker*. See *Mohamed*, 459 F.3d at 986; *United States* v. *Walker*, 447 F.3d 999, 1006 (7th Cir.), cert. denied, 127 S. Ct. 314 (2006). In those circuits, district courts routinely vary under Section 3553(a) without addressing the possibility of a Guidelines departure.

See, *e.g.*, *United States* v. *Santiago*, 495 F.3d 820, 823 (7th Cir. 2007); *United States* v. *Orosco-Cortez*, No. 06-50270, 2008 WL 162998, at *1 (9th Cir. Jan. 18, 2008). If a court were free to vary under Section 3553(a) on an unanticipated ground that paralleled a traditional departure factor without giving any notice, the parties would face sentencing by surprise—even though notice would have been required if the court had imposed the same sentence as a Guidelines departure. See, *e.g.*, *Mejia-Huerta*, 480 F.3d at 723-724; *Levine*, 477 F.3d at 606.[5]

In many other cases, district courts fail to give notice before imposing a non-Guidelines sentence and do not specify whether the deviation is based on a Guidelines departure or a Section 3553(a) variance. For example, in fiscal year 2007, district courts imposed approximately 8535 sentences outside the applicable Guidelines range on grounds other than government-sponsored downward departures. In 8.3% of those cases, the courts failed to specify whether they were relying on a Guidelines departure or a Section 3553(a) variance. See United States Sentencing Comm'n, *Preliminary Quarterly Data Report, Fourth Quarter Release, Preliminary Fiscal Year 2007 Data*, Table 1, at 1, http://www.ussc.gov/sc_cases/ Quarter_Report_4th_07.pdf (visited Mar. 19, 2008) (*2007 Sentencing Data*). If there were no

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[5] Indeed, because it has declared Guidelines departures "obsolete" after *Booker*, the Seventh Circuit has held that Rule 32(h) no longer "has *any* continuing application." *Walker*, 447 F.3d at 1006 (emphasis added). The position that traditional Guidelines departures are "obsolete" is incorrect. Section 3553(a) requires courts to consider "any pertinent policy statement * * * issued by the Sentencing Commission," 18 U.S.C. 3553(a)(5) (Supp. V 2005), and this Court has recognized that the parties may "argue *within the Guidelines framework*, for a departure from the applicable Guidelines range." *Rita*, 127 S. Ct. at 2461; see *id.* at 2464, 2465.

notice requirement for variances, many of those sentences would be likely upheld as variances on appellate review, despite the absence of advance notice of the deviation from the Guidelines range. Cf. *United States* v. *Morris*, 228 Fed. Appx. 906, 907-908 (11th Cir. 2007); *United States* v. *Moton*, 226 Fed. Appx. 936, 937 (11th Cir. 2007).

In an even larger number of cases, district courts rely on both a Guidelines departure and a Section 3553(a) variance, as alternative grounds, to justify a non-Guidelines sentence. See, *e.g.*, *United States* v. *Coughlin*, 500 F.3d 813, 819 (8th Cir. 2007); *United States* v. *Bradford*, 461 F. Supp. 2d 904, 928-929 (N.D. Iowa 2006), aff'd, 499 F.3d 910 (8th Cir. 2007), cert. denied, No. 07-7829 (Feb. 25, 2008). For example, in fiscal year 2007, courts relied on both grounds to justify almost 12% of the 8535 non-Guidelines sentences. *2007 Sentencing Data* Table 1, at 1. Unless there were a notice requirement for variances, a district court's failure to give notice before imposing a Guidelines departure would be harmless error any time that the court relied on Section 3553(a) as an alternative ground.

Even more troubling, if a district court recognized that it could not lawfully depart under the Guidelines because it had failed to give notice, it could still impose the same sentence under Section 3553(a). Absent a notice requirement for variances, the court would not be committing error at all. Cf. *United States* v. *Flanders*, 491 F.3d 1197, 1220-1221 (10th Cir. 2007). Thus, unless Rule 32 is construed to require notice of Section 3553(a) variances, Rule 32(h)'s requirement that courts provide notice of Guidelines departures will have little, if any, continuing force.

E. Construing Rule 32 To Mandate Notice Of Variances Would Enable Courts To Avoid Considering Whether Notice Is Required By Due Process

Interpreting Rule 32 to mandate notice of variances would also eliminate the need for courts to decide whether notice would otherwise be required by the Due Process Clause. In *Burns*, this Court held that there was a "serious" question whether due process required notice before a *sua sponte* departure from the mandatory Guidelines range. 501 U.S. at 138. The Court therefore concluded that the principle of constitutional avoidance required it to construe Rule 32 as mandating notice. *Ibid.* Although the question whether due process demands notice before a *sua sponte* variance from the advisory Guidelines range is substantially less serious than the due process issue in *Burns*, interpreting Rule 32 as requiring notice of variances obviates any need for the courts to address the constitutional issue.

In the mandatory Guidelines regime that prevailed when the Court decided *Burns*, a defendant had a legal right to a sentence within the Guidelines range unless there were grounds described in Section 3553(b) that justified a departure. There was therefore a substantial basis for believing that notice of a possible departure was essential to protect that legal right against erroneous deprivation. See *Burns*, 501 U.S. at 138; *id.* at 146-156 (Souter, J., dissenting) (considering but rejecting that argument). After *Booker*, the defendant no longer has a legal right to a Guidelines sentence absent a valid departure ground. Instead, the defendant may only challenge the reasonableness of his sentence on appeal under a deferential abuse-of-discretion standard. See *Booker*, 543 U.S. at 260-261; *Gall*, 128 S. Ct. at 597. Notice that the court is contemplating a non-Guidelines

sentence will help achieve the most appropriate sentence, especially in cases in which the grounds for the variance differ from the considerations governing the applicable within-range sentence. But such notice is not essential to ensure a reasonable sentence, let alone required by due process. See *United States* v. *Ausburn*, 502 F.3d 313, 324-327 (3d Cir. 2007), petition for cert. pending, No. 07-9534 (filed Feb. 19, 2008); *Greenholtz* v. *Inmates of the Neb. Penal & Corr. Complex*, 442 U.S. 1, 14 n.6 (1979) (due process does not require parole board to give notice of the factors it will consider in making a discretionary decision whether to grant parole).

Nonetheless, reading Rule 32 to require notice of variances best comports with its language and purposes. And giving the rule that meaning also eliminates any need to address the due process issue, which at least one court has already had to confront. See *Ausburn*, 502 F.3d at 324-327. That salutary result further supports construing Rule 32 to require notice of all deviations from the Guidelines range, including Section 3553(a) variances.

F. The Arguments For Limiting Rule 32 To Guidelines Departures Are Not Persuasive

The courts of appeals that have read Rule 32 as requiring notice only of Guidelines departures have offered essentially four reasons in support of their interpretation. None of those reasons is persuasive.

1. The fact that a Section 3553(a) variance is always possible does not eliminate the need for notice

Courts that have refused to read Rule 32 as covering Section 3553(a) variances have primarily reasoned that the parties are "inherently on notice" of the Section 3553(a) factors and know that the district court will con-

sider those factors in sentencing. J.A. 399-400. Those courts have concluded that there is therefore no danger of "unfair surprise or inability to present informed comment," the concerns that motivated this Court's decision in *Burns*. J.A. 400; *e.g.*, *Mejia-Huerta*, 480 F.3d at 722. That reasoning is flawed.

When *Burns* was decided, the parties were "equally aware of the specified circumstances for departure under the Guidelines." *Atencio*, 476 F.3d at 1104. Nonetheless, this Court held that this generalized notice was insufficient to satisfy Rule 32's purpose of promoting the "focused, adversarial resolution" of the issues relevant to sentencing because "no one is in a position to guess when or on what grounds a district court might depart." *Burns*, 501 U.S. at 137. The Court's reasoning applies just as forcefully to Section 3553(a) variances. Indeed, the potential for surprise is even more pronounced for variances, because courts have much greater freedom to vary under Section 3553(a) than to depart under the Guidelines. Section 3553(a) permits a court to vary based on policy considerations and factors that the Guidelines may have put off-limits. See *Kimbrough* v. *United States*, 128 S. Ct. 558 (2007). Accordingly, parties have, if anything, less ability to anticipate the basis for a *sua sponte* variance than a traditional departure. See *United States* v. *Davenport*, 445 F.3d 366, 371 (4th Cir. 2006). Although there may be cases, like this one, where the ultimate ground for a variance is little different from the disputed issues relevant to the appropriate sentence within the Guidelines range, that potential does little to help the parties *ex ante*. The greater number of potential grounds for variances puts a premium on notice of the factors that the sentencing judge believes to be relevant.

2. Requiring notice of Section 3553(a) variances is not unduly burdensome

Courts rejecting a notice requirement for variances have also expressed concern that requiring notice would be "unworkable" because a district court often will not know until the sentencing hearing itself that the court believes a non-Guidelines sentence is appropriate. *Vampire Nation*, 451 F.3d at 197; *United States* v. *Vega-Santiago*, No. 06-1558, 2008 WL 451813, at * 3 (1st Cir. Feb. 21, 2008) (en banc). That concern is unfounded.

The notice requirement for *sua sponte* Section 3553(a) variances will apply in relatively few cases. Rule 32(d)(1)(E) requires the PSR to identify any ground for imposing a non-Guidelines sentence. See note 4, *supra*. The United States Attorneys Offices inform us that, in the vast majority of cases in which a district court imposes a sentence outside the Guidelines range, the grounds for the variance have previously been identified by the PSR or the parties. Moreover, district courts will not be unduly burdened by providing notice in those rare cases in which the possible variance has not already been identified. Judges routinely review the PSR and other materials in advance of the sentencing hearing and "will already have a developed view of what the appropriate sentence is, including its length." *Vega-Santiago*, 2008 WL 451813, at *11 (Lipez, J., dissenting). Although the judge's views may be altered by the evidence and argument at the hearing, the "judge will almost always have considered in advance of the hearing whether an upward or downward variance is appropriate." *Ibid.* And, of course, if the hearing causes the judge to believe that a previously unacknowledged issue might warrant

a sentence outside the Guidelines range, that is precisely the situation when notice is critical.

Rule 32 does not impose a rigid requirement that notice be provided before the sentencing hearing. *Burns* "left open the possibility that the notice requirement might be met simply by notice at the hearing" itself. *United States* v. *Patrick*, 988 F.2d 641, 646 n.7 (6th Cir.), cert. denied, 510 U.S. 845 (1993). Accordingly, Rule 32 requires only that the notice be "reasonable." Fed. R. Crim. P. 32(h). Although some courts have concluded that prehearing notice is always required, see, *e.g.*, *Calzada-Maravillas*, 443 F.3d at 1304, that conclusion is not correct. Whether the sentencing court has provided "reasonable" notice depends on whether the notice allows the parties to comment meaningfully on the appropriateness of the departure or variance. See *United States* v. *Meeker*, 411 F.3d 736, 745 (6th Cir. 2005). The answer to that inquiry is necessarily "context-specific," *id.* at 744, and "will vary from case to case," *United States* v. *Reynoso*, 254 F.3d 467, 474 (3d Cir. 2001).

In many cases, notice provided at the sentencing hearing will be "reasonable," especially if other, related sentencing issues have been sufficiently developed. See, *e.g.*, *United States* v. *Hildebrand*, 152 F.3d 756, 766 (8th Cir.) (rejecting claim that court could not base upward departure in part on defendant's lack of remorse in his allocution when court had given notice that it was contemplating departure on other grounds), cert. denied, 525 U.S. 1033 (1998)). In other cases, a short recess of the hearing will be sufficient to provide the necessary notice. See *United States* v. *Nappi*, 243 F.3d 758, 765 (3d Cir. 2001). Although more time may be needed in some cases—particularly where the contemplated basis

for variance brings into play factual issues that have not previously been ventilated—the importance of fully airing the issues critical to sentencing justifies continuing the hearings in those cases.

*3. Requiring notice of Section 3553(a) variances is consistent with the role of the Guidelines in post-*Booker *sentencing*

Courts rejecting a notice requirement for variances have also reasoned that it would improperly "re-elevate the Guidelines to a position [they] no longer enjoy[]." *Mejia-Huerta*, 480 F.3d at 723; *e.g.*, *Vampire Nation*, 451 F.3d at 196. That reasoning misunderstands both the role of the Guidelines in post-*Booker* sentencing and the impact that a notice requirement would have on a district court's sentencing decision.

Even after *Booker*, the Guidelines play a critical role in sentencing. As this Court has explained, "the Guidelines should be the starting point and the initial benchmark" for all sentencing decisions. *Gall*, 128 S. Ct. at 596. "Where the judge imposes a sentence outside the Guidelines, the judge will explain why he has done so." *Rita*, 127 S. Ct. at 2468; see 18 U.S.C. 3553(c)(2) (Supp. V 2005) (requiring district court to state "the specific reason" for a non-Guidelines sentence). The court "must give serious consideration to the extent of any departure from the Guidelines," *Gall*, 128 S. Ct. at 594, and "ensure that the justification is sufficiently compelling to support the degree of the variance," *id.* at 597. On review, the court of appeals may apply a presumption of reasonableness to a sentence "that reflects a proper application of the Sentencing Guidelines." *Rita*, 127 S. Ct. at 2462. When reviewing a non-Guidelines sentence, "appellate courts may * * * take the degree of vari-

ance into account and consider the extent of a deviation from the Guidelines." *Gall*, 128 S. Ct. at 595.

The continuing importance of the Guidelines is evidenced by the fact that, in fiscal year 2007, 82% of all sentences fell within the Guidelines range (excluding government-sponsored downward departures). *2007 Sentencing Data* Table 1, at 1. Because the Guidelines remain central to the sentencing process, it remains entirely appropriate to require that the district court give the parties notice before imposing a non-Guidelines sentence based on grounds not previously identified. See *Anati*, 457 F.3d at 237.

Requiring notice will not cause district courts to impose within-Guidelines sentences when they otherwise would have varied from the Guidelines range. Before deciding that a variance is warranted, a judge will have carefully considered the Guidelines range and decided that "specific reasons" justify a non-Guidelines sentence. 18 U.S.C. 3553(c)(2) (Supp. V 2005). It is "inconceivable" that a judge who has reached that conclusion "would suppress that independent judgment" to avoid "[t]he modest burden of preparing a brief notice or, in the rare case, continuing an already convened sentencing hearing to a later date." *Vega-Santiago*, 2008 WL 451813, at *12 (Lipez, J., dissenting).

4. Rule 32(h)'s reference to "departure" is not limited to departures authorized by the Guidelines

Courts that have read Rule 32 as requiring notice of only Guidelines departures have also mistakenly relied on the "plain language" of Rule 32(h), noting that it "limits its application to *departures*." *Mejia-Huerta*, 480 F.3d at 722; see *Walker*, 447 F.3d at 1005. Some courts have assumed without analysis that a Section

3553(a) variance does not qualify as a "departure." See, *e.g.*, *Mejia-Huerta*, 480 F.3d at 722. As explained above, that assumption is unfounded. The ordinary meaning of "departure" is broad enough to include any deviation from the applicable Guidelines range, including a Section 3553(a) variance. Several courts have used the term "departure" to include variances, and this Court has used the terms "departure" and "variance" interchangeably. See pp. 21-22, *supra*.

The First Circuit in *Vega-Santiago* cited the Guidelines definition of "departure" in support of its holding that Rule 32(h) does not apply to Section 3553(a) variances. 2008 WL 451813, at *1. But the court did not quote the Guidelines language or offer any explanation of why the Guidelines definition does not encompass Section 3553(a) variances. In fact, as described above, the Guidelines define "departure" as any "sentence outside the applicable guideline range," Guidelines § 1B1.1, comment. (n.1(E)), an expansive definition that includes Section 3553(a) variances.

The term "departure" is also used in various statutory provisions that were enacted after Rule 32(h). See 18 U.S.C. 3553(b)(2), 3742(f)(2), (g)(2)(B) and (j), 5037(c)(1)(b), (2)(A)(ii) and (B)(ii) (Supp. V 2005). If those provisions were construed to encompass only Guidelines departures, they could not be reconciled with *Booker* and would have to be severed to avoid Sixth Amendment violations. See, *e.g.*, 18 U.S.C. 3742(g)(2) (Supp. V 2005) (stating that, on certain remands for resentencing, "[t]he court shall not impose a sentence outside the applicable guidelines range except upon a ground that–(A) was specifically and affirmatively included in the written statement of reasons required by section 3553(a) in connection with the previous sentenc-

ing of the defendant prior to the appeal; and (B) was held by the court of appeals, in remanding the case, to be a permissible ground of departure"). It may be, however, that one or more of the provisions can be read, like Rule 32, to encompass all non-Guidelines sentences, including variances. Whether any of the statutory provisions should be construed that way—and whether they would be consistent with *Booker* if they were so construed—depends on the particular context of each provision.

The ultimate interpretation of the statutory provisions will not, however, alter the correct interpretation of Rule 32. Nothing in the context of Rule 32 restricts its coverage to Guidelines departures; its language readily covers all non-Guidelines sentences; and that is the only construction that advances the rule's purposes. Accordingly, whatever "departure" means in the various statutory provisions, in Rule 32 the term includes all deviations from the Guidelines range, whether authorized by the Guidelines themselves or Section 3553(a).

II. THE DISTRICT COURT'S FAILURE TO GIVE NOTICE BEFORE VARYING FROM THE GUIDELINES RANGE WAS HARMLESS ERROR

Although the district court erred by imposing an above-Guidelines sentence without giving notice that it was contemplating a variance under Section 3553(a), the error was harmless because it did not affect the outcome of the sentencing proceeding. The PSR had raised the possibility of a Guidelines departure on essentially the same grounds as the variance—the likelihood that petitioner would commit future crimes. Moreover, that issue was the central focus of the sentencing hearing, and the difference between the top of the applicable range

and the sentence petitioner received was only nine months. Petitioner therefore had every incentive and opportunity to present evidence and argument about his future dangerousness. And the additional evidence that he now claims he would have presented would not have affected his sentence.

A. This Court Should Decide The Harmless Error Issue

Petitioner requests (Pet. Br. 29-31) that the Court decline to address whether the notice deficiency was harmless. The Court should reject that request.

As the prevailing party below, the government is entitled to defend the judgment on any ground supported by the record. *Bennett* v. *Spear*, 520 U.S. 154, 166-167 (1997). The harmless-error issue was fully briefed and argued below, see Gov't C.A. Br. 17-23; Pet. C.A. Reply 1-5; Gov't Rule 28(j) Letter (Mar. 22, 2006), and raised in the government's Brief in Opposition to the petition for a writ of certiorari, Br. in Opp. 13. The issue is therefore properly before this Court. Although the Court is not required to address the issue, the Court "plainly ha[s] the authority" to do so, and it has resolved harmlessness questions on numerous occasions. *United States* v. *Lane*, 474 U.S. 438, 450 (1986) (quoting *United States* v. *Hastings*, 461 U.S. 499, 510 (1983) (citing cases)). The Court should do the same here.

The parties have fully briefed the issue, the record is well developed but small, and the issue is contained. Resolving the issue therefore would not be overly burdensome. At the same time, the Court's resolution of the issue would provide vital guidance to the lower courts. Those courts are likely to be confronted with a significant number of cases presenting harmless-error

questions because half the circuits have erroneously read Rule 32 as limited to Guidelines departures.

B. *Kotteakos* Governs The Harmlessness Inquiry

Petitioner erroneously contends (Pet. Br. 30-31) that, before the Court can decide the harmless-error issue, the Court must decide whether notice of the variance in this case was required by the Due Process Clause. That contention is based on the erroneous assumption that resolution of the due process issue is necessary to determine which harmless-error standard applies to the district court's violation of Rule 32. Contrary to that assumption, the non-constitutional harmless-error standard of *Kotteakos* v. *United States*, 328 U.S. 750 (1946), applies to the Rule 32 violation, regardless of whether the lack of notice may also have violated due process.

Constitutional errors are reviewed for harmlessness under the standard in *Chapman* v. *California*, 386 U.S. 18, 24 (1967), which requires reversal unless the error is harmless beyond a reasonable doubt. For non-constitutional errors, however, reversal is required only if it is "highly probable" that the error had a "substantial and injurious effect or influence" in determining the outcome of the proceeding. *Kotteakos*, 328 U.S. at 776. The *Kotteakos* standard applies to violations of the Federal Rules of Criminal Procedure, including Rule 32. See, *e.g.*, *Lane*, 474 U.S. at 449 (applying *Kotteakos* to a violation of Fed. R. Crim. P. 8).

That conclusion is not affected by whether the notice deficiency was also a violation of due process. Petitioner has never, even in his briefs in this Court, raised a due process claim. Instead, he has consistently claimed only a violation of Rule 32 and the interpretation of that rule adopted in *Burns*, which declined to decide whether no-

tice is required by due process, see 501 U.S. at 138. See J.A. 377; Pet. C.A. Br. 15-18; Pet. C.A. Reply Br. 1-4; Pet. i, 5-10; Pet. Br. 24-25. Only a separate due process claim, if properly preserved and decided in petitioner's favor, would be reviewed under the *Chapman* harmless-error standard. See *United States* v. *Ramirez*, 479 F.3d 1229, 1246-1247 (10th Cir. 2007) (applying *Kotteakos* standard to admission of evidence in violation of hearsay rules because defendant did not also object based on alleged Confrontation Clause violation), cert. denied, 128 S. Ct. 1074 (2008); accord, *e.g.*, *United States* v. *Dukagjini*, 326 F.3d 45, 59-60 (2d Cir. 2003), cert. denied, 541 U.S. 1042 (2004).

Petitioner's theory—that, in order to ascertain the harmlessness of any violation of a rule or statute that has potential constitutional implications, courts must resolve unpreserved constitutional claims—cannot be correct. That approach would seriously undermine the doctrine of constitutional avoidance that this Court applied in *Burns*. There would be little point in a court's finding a violation of Rule 32 (or some other rule or statute) in order to avoid deciding a constitutional issue if the court would nonetheless have to decide that very issue in order to conduct the requisite harmless-error review. Because petitioner has properly preserved only a Rule 32 claim, the *Kotteakos* standard of harmless-error review applies.[6]

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[6] In its court-of-appeals brief (at 18), the government erroneously stated that the *Chapman* standard applies. The government later corrected that misstatement and informed the court of appeals that *Kotteakos* provides the applicable standard. Gov't 28(j) Letter 2.

C. The Notice Deficiency Did Not Affect Petitioner's Presentation At Sentencing

In any case, the district court's error in failing to give notice of the Section 3553(a) variance was harmless under both the *Kotteakos* and the *Chapman* standards. Beyond a reasonable doubt, petitioner's sentence would not have been different if the court had complied with Rule 32's notice requirement.

The district court varied above the recommended Guidelines range based on its conclusion that petitioner would "continue, as his ex-wife testified, in [his criminal] conduct" and, therefore, "the maximum time that he can be incapacitated is what is best for society." J.A. 374. As the court of appeals explained (J.A. 398-399), the district court thus concluded that an above-Guidelines sentence was necessary "to protect the public from further crimes" by petitioner. 18 U.S.C. 3553(a)(2)(C). Petitioner did not receive notice that the court might vary under Section 3553(a)(2)(C) based on the likelihood that he would commit further crimes. But petitioner did have notice that the likelihood that he would commit further crimes would be a central issue at sentencing and might support an above-Guidelines sentence.

The PSR, in a section entitled "Factors That May Warrant Departure," specifically stated that the sentencing court "may consider imposing a sentence departing from the otherwise applicable guideline range" under Guidelines § 4A1.3 based on "whether or not the defendant's criminal history category adequately reflects the defendant's past criminal conduct or *the likelihood that the defendant will commit other crimes*." J.A. 417 (emphasis added). Because petitioner knew that "the likelihood that [he would] commit other crimes" might be the basis for an above-Guidelines sentence, he had

every incentive to introduce evidence and argument on that issue.[7]

Petitioner provides no substantial reason to believe that he "would have done things differently" at sentencing if he had been given notice that the court was considering his future dangerousness in deciding whether to vary rather than to depart. *United States* v. *Himler*, 355 F.3d 735, 742 (3d Cir. 2004). And the court consequently would have imposed the same nine-month upward variance to maximize the protection of the public from petitioner's proclivity to make terroristic threats (and possibly carry them out). Accordingly, the notice deficiency was harmless. See *United States* v. *Tate*, No. 06-6529, 2008 WL 398312, at *8 (6th Cir. Feb. 15, 2008) (finding no plain error where PSR gave notice of a possible departure under Guidelines § 4A1.3 and district court varied under Section 3553(a) on the same factual basis).

Any differences between a Guidelines departure under Section 4A1.3 and a variance under Section 3553(a)(2)(C) did not affect petitioner's incentive or opportunity to address the likelihood that he would commit further crimes. That issue was central to both potential grounds for deviating from the Guidelines range. And much of the factual evidence on which the district court relied for the Section 3553(a)(2)(C) variance would have

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[7] Indeed, it could be argued that, because the PSR raised the possibility of a departure under Guidelines § 4A1.3, there was no notice error at all. The government has not made that argument, because a Section 4A1.3 departure, unlike a Section 3553(a)(2)(C) variance, requires a determination that the defendant's criminal history category under-represents the likelihood that he will commit future crimes. That difference, however, does not affect the harmless error analysis for the reasons explained in the text following this note.

supported a Section 4A1.3 departure. The court noted that it was persuaded by the testimony of petitioner's ex-wife. J.A. 374. Consistent with the facts in the PSR (J.A. 404-406, 410), she testified about petitioner's past physical and mental abuse of her and her children, as well as petitioner's 2001 violation of a protective order. J.A. 306-322. The district court also heard testimony, consistent with the facts in the PSR (J.A. 405-406), that, after his arrest, petitioner told his cellmate that he wanted to hire someone to kill his ex-wife's new husband. J.A. 336. None of that conduct was reflected in petitioner's criminal history category, and it therefore would have supported a departure under Section 4A1.3.[8] Because the district court could have imposed the same sentence as a Section 4A1.3 departure, a possibility of which petitioner indisputably had notice, the lack of notice of the variance was harmless. Cf. *Mohamed*, 459 F.3d at 987.

Even if there had been no possibility of a Section 4A1.3 departure, petitioner would still have had ample incentive and opportunity to address his propensity to commit further crimes. As petitioner could have anticipated, the prospect that he would continue his criminal conduct was the central focus of the sentencing hearing. It was the thrust of the victim-impact testimony of his

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[8] See *United States* v. *Carter*, 111 F.3d 509, 514-515 (7th Cir. 1997) (upholding Section 4A1.3 departure based in part on victim's testimony of defendant's past violence towards her and others); *United States* v. *Fayette*, 895 F.2d 1375, 1380 (11th Cir. 1990) (Section 4A1.3 departure may be justified based on offenses committed after defendant's guilty plea); Guidelines § 4A1.3(a)(2)(A) (departure may be based on prior sentence that did not count towards criminal history score); *id.* § 4A1.2 comment. (n.6) ("the criminal conduct underlying any conviction that is not counted in the criminal history score may be considered pursuant to § 4A1.3").

ex-wife (J.A. 306-322), who petitioner knew would be testifying at the hearing (J.A. 293). Nonetheless, after she testified that she was "certain" petitioner "w[ould] not stop" his threatening and abusive behavior (J.A. 320), he did not object that he lacked notice that the likelihood that he would commit further crimes would be at issue, nor did he request a continuance to develop more evidence or argument. Instead, he addressed his future dangerousness by taking the stand, denying many of his ex-wife's allegations, and contending that he would not threaten or harm her, her children, or her new husband in the future. J.A. 347-364.

The likelihood that petitioner would commit future crimes was also central to disputes over adjustments to his sentencing Guidelines range. The PSR recommended against a downward adjustment for acceptance of responsibility because it found that petitioner "continues to engage in, or attempt to engage in, criminal activity," as evidenced by his attempt to solicit his cellmate to kill his ex-wife's new husband. J.A. 406. The cellmate testified at the sentencing hearing (J.A. 333-347), and petitioner responded by testifying personally (J.A. 356) and arguing through counsel (J.A. 367) that the cellmate was lying. The district court denied the adjustment because it concluded that the cellmate had testified truthfully and that petitioner "still intends to threaten and to terrorize [his ex-wife] by whatever means he can." J.A. 372. The likelihood that petitioner would commit additional crimes was also central to the dispute over an upward adjustment based on his intent to carry out the threats in his e-mails. Arguing against the adjustment, defense counsel contended that petitioner "brags, he boasts, and he talks a lot," but he had no actual intent to harm his ex-wife or others. J.A. 366.

In finding the enhancement applicable, the district court concluded that petitioner "did in fact intend and does have a current intent, if he is able to, to carry out these threats." J.A. 371.

Because the likelihood that petitioner would commit future crimes was already central to the sentencing hearing, it is clear that petitioner's presentation at the hearing would not have been materially different if he had received notice that his future dangerousness would also be considered as grounds for a variance. That is especially true because there is only a nine month difference between the top of the Guidelines range and the variant sentence imposed by the district court. The lack of notice was therefore harmless. See *United States* v. *Milton*, 147 F.3d 414, 421 (5th Cir. 1998) (no plain error where defendant had notice that issue on which court based departure would be central to sentencing).

D. The Evidence That Petitioner Now Claims He Would Have Presented Would Not Have Affected His Sentence

Until petitioner filed his merits brief in this Court, he never identified any evidence or argument that he would have made if he had received notice that the district court was considering a variance. Petitioner now claims that he would have presented testimony by Dr. Bennett, the defense expert who testified at his competency hearing, that his threats were "fueled by his mental illness," that his symptoms "could be successfully treated through antipsychotic medications and psychotherapy," and that incarceration was "likely to *increase* his delusional ideations" and alternative forms of supervision would be preferable. Pet. Br. 32. That evidence would not have affected the district court's sentencing decision

and therefore does not undermine the conclusion that the notice deficiency was harmless.

Petitioner actually presented at sentencing essentially the same argument that he now contends he failed to present because of the lack of notice. Defense counsel argued to the court that petitioner is "struggling with mental illness. He's going to get treatment, he's going to do right, he's going to be with us no matter what we do. In three or four years, one or two years, he's going to be on the street. And I think at this point we all need to get together and figure out what will satisfy all our interests; and that's for him to get the help he needs and to get on with his life." J.A. 368. If petitioner thought testimony from Dr. Bennett supporting that argument would be useful, he had every incentive and opportunity to offer it. Petitioner acknowledges that Dr. Bennett's testimony was "available." Pet. Br. 32-33. Defense counsel could have, but did not, seek to introduce that testimony or the report that Dr. Bennett had prepared for the competency hearing. Instead, counsel urged the court to consider a psychiatric report that had been prepared by the Bureau of Prisons shortly before the sentencing hearing, which stated that petitioner had refused psychiatric treatment. J.A. 365; Butner FMC Report 11.

In any event, the district court had already received Dr. Bennett's report. J.A. 2. The report addressed the issues that petitioner suggests Dr. Bennett would have raised at sentencing. Bennett Report 5. Contrary to petitioner's description of Dr. Bennett's likely testimony, however, his report does not state that petitioner's condition can be "successfully treated" but states only that medications "may well improve [petitioner's] thinking." *Ibid.* Cumulative testimony about

that theoretical possibility would not have altered the court's conclusions about petitioner's future dangerousness.

That is particularly clear because the district court had already rejected Dr. Bennett's diagnosis that petitioner suffers from a delusional disorder that could be treated with antipsychotic drugs. J.A. 267-268. Instead, the district court had accepted the diagnosis of the government's psychiatric expert, Dr. Buigas, that petitioner suffers from a personality disorder (*ibid.*), a diagnosis that petitioner also now accepts (Pet. Br. 3 & n.2). As Dr. Buigas testified, petitioner's personality disorder is "characterological" in nature, "long-standing," and "resistant to change." Buigas Report 10-11; see J.A. 127, 136-137, 138, 269. Contrary to petitioner's suggestion (Pet. Br. 7 n.3), Dr. Buigas did not testify that petitioner could be successfully treated with antipsychotic drugs. Instead, Dr. Buigas testified that those drugs "could mitigate" some symptoms if petitioner had a delusional disorder, a diagnosis that both Dr. Buigas and the district court rejected. J.A. 146, 268. Moreover, the district court was aware at sentencing that petitioner had refused psychiatric medication in the past (J.A. 146), had again refused such medication (Butner FMC Report 11), and was "not motivated to engage in any treatment" (*id.* at 14).

Petitioner's long history of violence towards his ex-wife and their children—detailed in his ex-wife's testimony (J.A. 303-322), confirmed by the findings of the judge who presided over their divorce (J.A. 411), and set forth in the psychiatric reports submitted to the district court, *e.g.*, Butner FMC Report 3-4—established that petitioner was a danger in the past and would pose a danger in the future. Accordingly, petitioner's sentence

would have been no different if he had received specific notice of the Section 3553(a) variance based on the likelihood that he would commit future crimes. The lack of notice of the variance was harmless error.[9]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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MARCH 2008

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[9] Petitioner is currently scheduled to be released from imprisonment, after consideration of good time credits, on May 5, 2008. His release would not, however, render the case moot. If this Court disagrees with the government and concludes that the lack of notice was harmful error, petitioner could request the district court to exercise its discretion under 18 U.S.C. 3583(e) (2000 & Supp. V 2005) to reduce his term of supervised release. See *United States* v. *Johnson*, 529 U.S. 53, 60 (2000).

APPENDIX

RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

1. The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law.

2. Section 3553 of Title 18 of the United States Code (2000 & Supp. V 2005) provides, in pertinent part:

Imposition of a sentence

(a) FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed—
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742 (g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incor-

porated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.[1]

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) APPLICATION OF GUIDELINES IN IMPOSING A SENTENCE.—

(1) In General—Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Com-

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[1] So in original. The period probably should be a semicolon.

mission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.[*]

(2) Child crimes and sexual offenses—

(A)[2] **Sentencing**—In sentencing a defendant convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless—

> (i) the court finds that there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence greater than that described;

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[*] In *United States* v. *Booker*, 543 U.S. 220 (2005), this provision was severed by the Court in order to remedy a Sixth Amendment violation.

[2] So in original. No subpart (B) has been enacted.

(ii) the court finds that there exists a mitigating circumstance of a kind or to a degree, that—

(I) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, taking account of any amendments to such sentencing guidelines or policy statements by Congress;

(II) has not been taken into consideration by the Sentencing Commission in formulating the guidelines; and

(III) should result in a sentence different from that described; or

(iii) the court finds, on motion of the Government, that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense and that this assistance established a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence lower than that described.

In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission, together with any amendments thereto by act of Congress. In the absence of an applicable sentencing guideline, the court

shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission, together with any amendments to such guidelines or policy statements by act of Congress.

(c) STATEMENT OF REASONS FOR IMPOSING A SENTENCE.—The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence—

(1) is of the kind, and within the range, described in subsection (a)(4), and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment and commitment, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the courts, statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission,,[3] and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

3. Section 3742 of Title 18 of the United States Code (2000 & Supp. V 2005) provides, in pertinent part:

Review of a sentence

(a) APPEAL BY A DEFENDANT.—A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or

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[3] So in original. The second comma probably should not appear.

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

(b) APPEAL BY THE GOVERNMENT.—The Government may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is less than the sentence specified in the applicable guideline range to the extent that the sentence includes a lesser fine or term of imprisonment, probation, or supervised release than the minimum established in the guideline range, or includes a less limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the minimum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

The Government may not further prosecute such appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General.

* * * * *

(f) DECISION AND DISPOSITION.—If the court of appeals determines that—

(1) the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand

the case for further sentencing proceedings with such instructions as the court considers appropriate;

(2) the sentence is outside the applicable guideline range and the district court failed to provide the required statement of reasons in the order of judgment and commitment, or the departure is based on an impermissible factor, or is to an unreasonable degree, or the sentence was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and—

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(3) the sentence is not described in paragraph (1) or (2), it shall affirm the sentence.

(g) SENTENCING UPON REMAND.—A district court to which a case is remanded pursuant to subsection (f)(1) or (f)(2) shall resentence a defendant in accordance with section 3553 and with such instructions as

may have been given by the court of appeals, except that—

(1) In determining the range referred to in subsection 3553(a)(4), the court shall apply the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that were in effect on the date of the previous sentencing of the defendant prior to the appeal, together with any amendments thereto by any act of Congress that was in effect on such date; and

(2) The court shall not impose a sentence outside the applicable guidelines range except upon a ground that—

(A) was specifically and affirmatively included in the written statement of reasons required by section 3553(c) in connection with the previous sentencing of the defendant prior to the appeal; and

(B) was held by the court of appeals, in remanding the case, to be a permissible ground of departure.

* * * * *

(j) DEFINITIONS.—For purposes of this section—

(1) a factor is a "permissible" ground of departure if it—

(A) advances the objectives set forth in section 3553(a)(2); and

(B) is authorized under section 3553(b); and

(C) is justified by the facts of the case; and

(2) a factor is an "impermissible" ground of departure if it is not a permissible factor within the meaning of subsection (j)(1).

4. Section 5037 of Title 18 of the United States Code (2000 & Supp. V 2005) provides, in pertinent part:

Dispositional hearing

* * * * *

(c) The term for which official detention may be ordered for a juvenile found to be a juvenile delinquent may not extend—

(1) in the case of a juvenile who is less than eighteen years old, beyond the lesser of—

(A) the date when the juvenile becomes twenty-one years old;

(B) the maximum of the guideline range, pursuant to section 994 of title 28, applicable to an otherwise similarly situated adult defendant unless the court finds an aggravating factor to warrant an upward departure from the otherwise applicable guideline range; or

(C) the maximum term of imprisonment that would be authorized if the juvenile had been tried and convicted as an adult; or

(2) in the case of a juvenile who is between eighteen and twenty-one years old—

(A) who if convicted as an adult would be convicted of a Class A, B, or C felony, beyond the lesser of—

(i) five years; or

(ii) the maximum of the guidelines range, pursuant to section 994 of title 28, applicable to an otherwise similarly situated adult defendant unless the court finds an aggravating factor to warrant an upward departure from the otherwise applicable guideline range; or

(B) in any other case beyond the lesser of—

(i) three years; or

(ii) the maximum of the guideline range, pursuant to section 994 of title 28, applicable to an otherwise similarly situated adult defendant unless the court finds an aggravating factor to warrant an upward departure from the otherwise applicable guideline range; or

(iii) the maximum term of imprisonment that would be authorized if the juvenile had been tried and convicted as an adult

5. Rule 32 of the Federal Rules of Criminal Procedure provides, in pertinent part:

Sentencing and Judgment

* * * * *

(c) Presentence Investigation.

(1) *Required Investigation.*

(A) *In General.* The probation officer must conduct a presentence investigation and submit a report to the court before it imposes sentence unless:

(i) 18 U.S.C. § 3593(c) or another statute requires otherwise; or

(ii) the court finds that the information in the record enables it to meaningfully exercise its sentencing authority under 18 U.S.C. § 3553, and the court explains its finding on the record.

(B) *Restitution.* If the law requires restitution, the probation officer must conduct an investigation and submit a report that contains sufficient information for the court to order restitution.

(2) ***Interviewing the Defendant.*** The probation officer who interviews a defendant as part of a presentence investigation must, on request, give the defendant's attorney notice and a reasonable opportunity to attend the interview.

(d) Presentence Report.

(1) ***Applying the Advisory Sentencing Guidelines.*** The presentence report must:

(A) identify all applicable guidelines and policy statements of the Sentencing Commission;

(B) calculate the defendant's offense level and criminal history category;

(C) state the resulting sentencing range and kinds of sentences available;

(D) identify any factor relevant to:

(i) the appropriate kind of sentence, or

(ii) the appropriate sentence within the applicable sentencing range; and

(E) identify any basis for departing from the applicable sentencing range.

(2) ***Additional Information.*** The presentence report must also contain the following information:

(A) the defendant's history and characteristics, including:

(i) any prior criminal record;

(ii) the defendant's financial condition; and

(iii) any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in correctional treatment;

(B) verified information, stated in a nonargumentative style, that assesses the financial, social, psychological, and medical impact on any individual against whom the offense has been committed;

(C) when appropriate, the nature and extent of nonprison programs and resources available to the defendant;

(D) when the law provides for restitution, information sufficient for a restitution order;

(E) if the court orders a study under 18 U.S.C. § 3552(b), any resulting report and recommendation; and

(F) any other information that the court requires, including information relevant to the factors under 18 U.S.C. § 3553(a).

(3) ***Exclusions.*** The presentence report must exclude the following:

(A) any diagnoses that, if disclosed, might seriously disrupt a rehabilitation program;

(B) any sources of information obtained upon a

promise of confidentiality; and

(C) any other information that, if disclosed, might result in physical or other harm to the defendant or others.

(e) Disclosing the Report and Recommendation.

(1) ***Time to Disclose.*** Unless the defendant has consented in writing, the probation officer must not submit a presentence report to the court or disclose its contents to anyone until the defendant has pleaded guilty or nolo contendere, or has been found guilty.

(2) ***Minimum Required Notice.*** The probation officer must give the presentence report to the defendant, the defendant's attorney, and an attorney for the government at least 35 days before sentencing unless the defendant waives this minimum period.

(3) ***Sentence Recommendation.*** By local rule or by order in a case, the court may direct the probation officer not to disclose to anyone other than the court the officer's recommendation on the sentence.

(f) Objecting to the Report.

(1) ***Time to Object.*** Within 14 days after receiving the presentence report, the parties must state in writing any objections, including objections to material information, sentencing guideline ranges, and policy statements contained in or omitted from the report.

(2) ***Serving Objections.*** An objecting party must provide a copy of its objections to the opposing party and to the probation officer.

(3) ***Action on Objections.*** After receiving objections, the probation officer may meet with the parties to discuss the objections. The probation officer may

then investigate further and revise the presentence report as appropriate.

(g) Submitting the Report. At least 7 days before sentencing, the probation officer must submit to the court and to the parties the presentence report and an addendum containing any unresolved objections, the grounds for those objections, and the probation officer's comments on them.

(h) Notice of Possible Departure from Sentencing Guidelines. Before the court may depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure.

(i) Sentencing.

(1) ***In General.*** At sentencing, the court:

(A) must verify that the defendant and the defendant's attorney have read and discussed the presentence report and any addendum to the report;

(B) must give to the defendant and an attorney for the government a written summary of—or summarize in camera—any information excluded from the presentence report under Rule 32(d)(3) on which the court will rely in sentencing, and give them a reasonable opportunity to comment on that information;

(C) must allow the parties' attorneys to comment on the probation officer's determinations

and other matters relating to an appropriate sentence; and

(D) may, for good cause, allow a party to make a new objection at any time before sentence is imposed.

(2) ***Introducing Evidence; Producing a Statement.*** The court may permit the parties to introduce evidence on the objections. If a witness testifies at sentencing, Rule 26.2(a)-(d) and (f) applies. If a party fails to comply with a Rule 26.2 order to produce a witness's statement, the court must not consider that witness's testimony.

(3) ***Court Determinations.*** At sentencing, the court:

(A) may accept any undisputed portion of the presentence report as a finding of fact;

(B) must—for any disputed portion of the presentence report or other controverted matter—rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing; and

(C) must append a copy of the court's determinations under this rule to any copy of the presentence report made available to the Bureau of Prisons.

(4) ***Opportunity to Speak.***

(A) *By a Party.* Before imposing sentence, the court must:

(i) provide the defendant's attorney an opportunity to speak on the defendant's behalf;

(ii) address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence; and

(iii) provide an attorney for the government an opportunity to speak equivalent to that of the defendant's attorney.

(B) *By a Victim.* Before imposing sentence, the court must address any victim of a crime of violence or sexual abuse who is present at sentencing and must permit the victim to speak or submit any information about the sentence. Whether or not the victim is present, a victim's right to address the court may be exercised by the following persons if present:

(i) a parent or legal guardian, if the victim is younger than 18 years or is incompetent; or

(ii) one or more family members or relatives the court designates, if the victim is deceased or incapacitated.

(C) *In Camera Proceedings.* Upon a party's motion and for good cause, the court may hear in camera any statement made under Rule 32(i)(4).

No. 06-7517

FILED
FEB 14 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The Supreme Court of the United States

RICHARD IRIZARRY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

JOINT APPENDIX

VOLUME I

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UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA,
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11/25/2003	INDICTMENT as to Richard Irizarry (1) count(s) 1 Threatening Interstate Communications. (Attachments: # 1 Penalty Page) (adk) (Entered: 11/26/2003)
01/22/2004	ORDER APPOINTING FEDERAL PUBLIC DEFENDER K. Lyn Hillman for Richard Irizarry appointed. Signed by Judge Kristi D. Lee on 1/22/04. (mca,) (Entered: 01/23/2004)
02/05/2004	Notice of Insanity Defense by Richard Irizarry (Hillman, K.) (Entered: 02/05/2004)
02/18/2004	MOTION for Psychiatric Exam by USA as to Richard Irizarry. (Referred to Judge Cassady on 2/19/04)(tot,) (Entered: 02/19/2004)
02/20/2004	ORDER FOR PSYCHIATRIC EXAMINATION OF DEFENDANT PURSUANT TO 18 USC SECTIONS 4241 AND 4242, granting 19 Motion for Psychiatric Exam as to Richard Irizarry, and continuing pretrial conference set for 3/9/04 and trial set for April, 2004 until completion of defendant's evaluation and return to this District. Signed by Judge William E. Cassady on 02/20/2004. (mab) (Entered: 02/20/2004)

05/27/2004 SUPERSEDING INDICTMENT as to Richard Irizarry (1) count(s) 1s – Threatening Interstate Communications (Attachments: # Penalty Pages) (srr,) (Entered: 05/27/2004)

07/20/2004 Psychiatric Report of Dr. Bennett Dated 2/6/04 Received (Sealed) as to Richard Irizarry (mab) (Entered: 07/20/2004)

07/20/2004 Psychiatric Report Received (Sealed) as to Richard Irizarry (mab) (Entered: 11/09/2004)

07/20/2004 STIPULATION filed by USA and Richard Irizarry in open Court (mab) (Entered: 11/09/2004)

07/21/2004 Minute Entry for proceedings held before Judge Callie V. S. Granade:Competency Hearing as to Richard Irizarry held on 7/21/2004. (Court Reporter Roy Isbell) (mab) Defendant's exhibits on correspondence side of filed, except Exh. #5, which was placed in Crim. Safe) Modified on 11/9/2004 (mab). (Entered: 07/21/2004)

11/05/2004 ORDER as to Richard Irizarry re: compentency hrg held on 7/20/04 & 7/21/04. The court finds that dft is mentally competent to proceed as set out. Miscellaneous deadline set for 11/15/2004 for defense counsel to advise the court whether the dft wishes to enter a guilty plea or proceed to trial. Signed by Judge Callie V. S. Granade on 11/5/04. (copies to AUSA, Dft's Attny, Prob, P/T & USM on 11/5/04)(tot,) (Entered: 11/05/2004)

11/22/2004 Unopposed MOTION for Medical Treatment *pending sentencing under 18 U.S.C. 4244* by Richard Irizarry. (Hillman, K.) (Entered: 11/22/2004)

11/22/2004 Order on Guilty Plea entered. Richard Irizarry Guilty Count 13 of the Superseding Indictment. Court Reporter Roy Isbell. Sentencing set for 2/23/2005 at 1:00 PM in Courtroom 2B before Chief Judge Callie V. S. Granade. Presentence Investigation Report due 1/19/2005. Position with Respect to Sentencing Factors due 2/9/2005. Deft. to remain in custody. Signed by Judge Callie V. S. Granade on 11/22/2004. (Attachments: #(1) Standing Order No. 5) (mab) (Entered: 11/22/2004)

11/29/2004 ORDER, Dft's 41 Motion for Hospitalization of a Convicted Person Suffering from Mental Disease or Defect Pending Sentencing Pursuant to 18 U.S.C. Sec. 4244 as to Richard Irizarry is GRANTED as set out. Dft Irizarry shall be transferred to a facility designated by the BOP for an examination as set out. The court RECOMMENDS to the BOP that FMC Rochester be the designated institution for the ordered examination. The USM is ORDERED to employ direct transport in moving the dft from this District to the designated institution of evaluation. Signed by Judge Callie V. S. Granade on 11/29/04. (copies to AUSA, Dft's Attny, Prob, P/T & 4 cert. to USM on 11/29/04) (tot,) (Entered: 11/29/2004)

12/29/2004 MOTION to Withdraw as Attorney by K. Lyn Hillman. by Richard Irizarry. (Hillman, K.) (Entered: 12/29/2004)

01/05/2005 TRANSCRIPT of Proceedings as to Richard Irizarry held on 7/20/04-7/21/04 Competency Hearing before Chief Judge Callie V.S. Granade. Court Reporter: Roy Isbell. (lsw) (Entered: 01/05/2005)

01/13/2005 ENDORSED ORDER granting 45 MOTION to Withdraw as Attorney by K. Lyn Hillman as to Richard Irizarry (1). Attorney Arthur Madden is hereby appointed to represent Mr. Irizarry. Signed by Judge Callie V. S. Granade on 1/13/2005. (Granade, Callie) (Entered: 01/13/2005)

02/11/2005 POSITION regarding sentencing factors filed by USA as to Richard Irizarry without objections (Butler, Steven) (Entered: 02/11/2005)

03/07/2005 RESPONSE to filed by Defendants Richard Irizarry, Richard Irizarry PSR response (Madden, Arthur) Corrected copy of response added on 3/7/2005 (mab) (Entered: 03/07/2005)

03/10/2005 Original Psychiatric Report Received (Sealed) as to Richard Irizarry (mab) (Entered: 03/10/2005)

03/17/2005 Minute Entry for proceedings held before Judge Callie V. S. Granade: Sentencing held on 3/17/2005 for Richard Irizarry, Imprisonment 60 months as to Count 13, w/recommendation that deft. be imprisoned where a mental health treatment

program is available; SRT 3 years, w/special conditions imposed as set out in judgment; $100.00; Counts 1-12 and 14 & 15 dismissed on motion of the government. (Court Reporter Roy Isbell) (Exhibits in WHITE BINDER) (mab) (Entered: 03/17/2005)

03/22/2005 NOTICE OF APPEAL as to Richard Irizarry re: 63 Judgment, filed on 3/22/05 (NOA filed by CJA attorney Madden, Arthur) Hearing letter and CJA 24 forms forwarded to attorney Madden on 3/23/05. Modified on 3/23/2005 (lsw). (Entered: 03/17/2005)

03/22/2005 JUDGMENT as to Richard Irizarry, Count 13ss – Imprisonment: 60 months w/recommendation that dft be imprisoned where a mental health treatment program is available; SRT: 3 years w/special conditions that (1) dft participate in mental health treatment &/or counseling program as directed by USPO; & (2) dft is prohibited from initiating contact w/his ex-wife or her husband, or their children, & he is prohibited from being w/i the area where they are located; SA: $100.00.; Counts 14sss-15sss, 1s, 2ss-12ss – Dismissed on motion of the government. Signed by Judge Callie V. S. Granade on 3/22/05. (copies to AUSA, Dft's Attny, Finance/USDC, Finance/USAO, Appeals, BOP, Prob, P/T & 2 cert. to USM on 3/22/05) (tot,) (Entered: 03/22/2005)

05/02/2005 TRANSCRIPT filed as to Richard Irizarry for dates of 3/17/05 Sentencing before Chief Judge Callie V.S. Granade, re 61 Notice of Appeal – Final Judgment Court Reporter: Roy Isbell. USCA Case Number 05-11718-D. Certificate of Readiness due by 5/16/2005. Notice of Transcript Redaction to be filed by 5/9/2005. Statement of Transcript Redaction to be filed with Court Reporter by 5/23/2005. (lsw) Attachment # 1 Pilot Project Notice. (Entered: 05/02/2005)

08/30/2006 MANDATE of USCA (certified copy) issued 8/30/06 as to Richard Irizarry re 61 Notice of Appeal – Final Judgment: Irizarry's sentence is AFFIRMED, as set out. USCA case number 05-11718. (lsw) (Entered: 08/31/2006)

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT,
United States v. Irizarry,
Case No. 05-11718

06/02/2006	Arthur J. Madden, III argued for Appellant; David Andrew Sigler argued for Appellee
08/01/2006	Judgment Entered
08/01/2006	Opinion Issued
8/30/2006	Mandate Issued
11/06/2006	Notice of Filing Certiorari # 06-7517: (Atty: Arthur J. Madden, III) Richard Irizarry

SEB

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

UNITED STATES OF AMERICA	*	**CRIMINAL NO. 03-00236-CG**
	*	
v.	*	**USAO NO. 03R00471**
	*	
RICHARD IRIZARRY	*	**Violation: 18 USC § 875(e)**

INDICTMENT

(Filed Nov. 25, 2003)

THE GRAND JURY CHARGES:

COUNT ONE

Beginning on or about September 2, 2003, and continuing to the present, in the Southern District of Alabama, Southern Division, the defendant,

RICHARD IRIZARRY

willfully and knowingly did transmit in interstate commerce from the State of California to the State of Alabama, by use of a computer connected to the Internet, electronic communications containing threats to kill or injure the person of Leah Smith, and family members and acquaintances of Leah Smith.

In violation of Title 18, United States Code, Section 875(c).

A TRUE BILL

/s/ [Illegible]
FOREMAN, UNITED STATES
GRAND JURY
SOUTHERN DISTRICT
OF ALABAMA

DAVID P. YORK
UNITED STATES ATTORNEY
By:

/s/ Steven E. Butler
Steven E. Butler
Assistant United States Attorney

/s/ GS Vann
Gina S. Vann
Assistant United States Attorney
Chief Criminal Division NOVEMBER 2003

PENALTY PAGE

DEFENDANT:	**RICHARD IRIZZARY (COUNT ONE)**
USAO NO.	**03R00471**
AUSA:	**STEVEN E. BUTLER**
CODE VIOLATION:	
COUNT ONE:	**18 U.S.C. § 875(c) – Threatening Interstate Communications**
PENALTY:	
COUNT ONE:	**5 yrs/$250,000/ 3 yrs SRT/$100 SA**

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	**CRIM. NO. 03-00002[illegible]-CG-L**
v.	)	
	)	
RICHARD IRIZARRY.	)	

NOTICE OF INSANITY DEFENSE

COMES NOW the Defendant, Richard Irizarry, pursuant to Fed. R Crim. P. 12.2., to give notice that he intends to rely on a defense of insanity at trial. The required expert opinion and related disclosures required pursuant to Fed. R. Crim. P. 16 are not yet ready. AUSA Steve Butler has been appraised of this fact, which also forms the basis for a Motion to Continue which is unopposed.

Respectfully submitted,

s/ K. Lyn Hillman
HILLK8765
2 South Water Street, 2nd Floor
Mobile, AL 36602
(251) 433-0910
(251) 433-0686
Lyn_Hillman@fd.org

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was delivered to AUSA Steve Butler by electronic mail on this 5th day of February 2004.

s/ K. Lyn Hillman

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

UNITED STATES OF AMERICA	*	
	*	**CRIM. NO. 03-00236-CG**
v.	*	
RICHARD IRIZARRY	*	

UNITED STATES' UNOPPOSED MOTION FOR PSYCHIATRIC EXAMINATION OF DEFENDANT

(Filed Feb. 18, 2004)

COMES NOW the United States of America, by and through the United States Attorney for the Southern District of Alabama, and respectfully moves this Honorable Court to order that defendant be taken into custody by the United States Marshal and transferred to such institution as shall be designated by the United States Bureau of Prisons for examination by a qualified psychiatrist or psychologist for a prompt determination of mental competency, pursuant to 18 U.S.C. 4241, 4242 and 4247. The instant motion is unopposed by defendant.

On February 5, 2004, defendant filed his "Notice of Insanity Defense" pursuant to Rule 12.2, Federal Rules of Criminal Procedure. In addition, since that time, defendant's own mental health expert has evaluated him, who already has concluded that

defendant suffers from a delusional psychiatric disorder which may impact his ability to communicate sufficiently with his trial counsel. It is submitted that there is reasonable cause to believe that defendant may be so mentally incompetent as to not be able to stand trial or not to be held responsible for the alleged criminal conduct at the time the offense was committed.

For these reasons, in accordance with 18 U.S.C. 4242(a), it is requested that this Court order defendant to be taken into custody by the United States Marshal and transferred to such institution as shall be designated by the Bureau of Prisons for examination by a qualified psychiatrist or psychologist for a prompt determination of mental competency of defendant as to: (1) whether defendant is suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense; and (2) whether, at the time of the commission of the acts constituting the charged offenses, defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality, or the wrongfulness or [sic] his acts.

Respectfully submitted,

DAVID P. YORK
UNITED STATES ATTORNEY
By:

/s/ Steven E. Butler
Steven E. Butler
Assistant United States Attorney
United States Attorney's Office
63 South Royal Street, Suite 600
Mobile, Alabama 36602
Telephone: (251) 415-7102
Fax: (251) 441-5131
E-mail: steven.butler@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading has been served upon Lyn Hillman, Esquire, counsel for defendant, via delivery to the Federal Defender's mailbox at the United States Courthouse, on this 18th day of February, 2004.

/s/ Steven E. Butler
Steven E. Butler
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

UNITED STATES OF AMERICA	:	
VS.	:	CRIMINAL NO. 03-00236-CG
RICHARD IRIZARRY	:	

ORDER FOR PSYCHIATRIC EXAMINATION OF DEFENDANT PURSUANT TO 18 U.S.C. §§ 4241 AND 4242

This cause having come on for consideration on a petition by the government for a determination of the mental competency of the defendant as to:

1. Whether or not the defendant is suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense, and,

2. Whether or not, at the time of the commission of the acts constituting the charged offense, that is, interstate communications threat, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality, or the wrongfulness of his acts.

The Government submits that the defendant has asserted an insanity defense and has expert evidence that he suffers from a serious mental disease or

defect. Ms. Hillman, on her client's behalf, did not voice an objection to the government's request.

Having considered the motion and the comments of counsel, the Court finds that there is reasonable cause to believe that the defendant may be so mentally incompetent as to not be able to stand trial or not to be held responsible for his alleged criminal conduct at the time the offense was committed.

It is, therefore, ORDERED that the defendant, Richard Irizarry, be taken into custody and transferred to a facility designated by the Bureau of Prisons, for an examination as promptly as possible, but not to exceed forty-five (45) days, for a determination of the mental competency of the defendant as to those matters set forth hereinabove in paragraphs numbered 1 and 2, and that such examination be made by at least one qualified psychiatrist or psychologist under the provisions of 18 U.S.C. §§ 4241, 4242 and 4247 for such determination. The examination period will commence once the defendant has reached the designated facility.

The United States Marshal for this District shall serve a copy of this Order on the defendant, and the Clerk of the Court will serve a copy hereof on the United States Attorney and the defendant's attorney of record, Lyn Hillman. The United States Attorney is ORDERED to forward to the designated facility a summary letter setting forth a full exposition concerning the alleged crime, together with all background information on the accused, including his

history of any criminal convictions and any prior history of mental illness. Defense counsel is ORDERED to forward to the designated facility any pertinent information and records available concerning the defendant's background and prior evaluation, diagnosis and treatment for any mental illness.

Within fifteen (15) days of he [sic] last date of examination, the examining physician shall submit a written report to this Court comporting with 18 U.S.C. § 4247(c), containing his/her findings as to the mental competency of the defendant in accordance with this Order. Copies of the report shall be provided to counsel for the defendant and to the attorney for the government.

The final pretrial conference that was scheduled for March 9, 2004, and jury selection set for April 5, 2004, are hereby **CONTINUED** pending the completion of defendant's evaluation and return to this District.

DONE at Mobile, Alabama, this 20th day of February, 2004.

s/ WILLIAM E. CASSADY
UNITED STATES
MAGISTRATE JUDGE

SEB/gp

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

UNITED STATES OF AMERICA	:	**CRIMINAL NO. 03-00236-CG**
v.	:	**USAO NO. 03R00471**
RICHARD IRIZARRY	:	**Violations: 18 USC § 875(c)**

SUPERSEDING INDICTMENT

(Filed May 27, 2004)

THE GRAND JURY CHARGES:

COUNTS ONE THROUGH FIFTEEN

On or about the dates set forth below, in the Southern District of Alabama, Southern Division, and elsewhere, the defendant,

RICHARD IRIZARRY

willfully and knowingly did transmit in interstate commerce from the State of California to the State of Alabama, by use of a computer connected to the Internet, electronic communications containing threats to kill or injure the person of Leah Smith, and family members and acquaintances of Leah Smith as follows:

COUNT	DATE OF ELECTRONIC COMMUNICATION	"SUBJECT" OF ELECTRONIC COMMUNICATION
ONE	3/15/2003	None
TWO	3/19/2003	"This email is for you to reconsider"
THREE	4/30/2003	"N. and A. Leah, I need to hear from you"
FOUR	5/16/2003	"You are unbelievable and i am ready to go to the death penalty!"
FIVE	8/27/2003	"Part two"
SIX	8/29/2003	"3rd part and last"
SEVEN	9/02/2003	"To whom ever is receiving this email among all i have sent"
EIGHT	10/09/2003	"?"
NINE	10/13/2003	"?"
TEN	10/13/2003	"To whom it may concern"
ELEVEN	10/13/2003	"Liar!!!!!!!! Don't blow it for Elaines head will be in a bag!"
TWELVE	10/27/2003	"Leah please respond for i am at the end of the line"

THIRTEEN	11/05/2003	"You have been warned for the very last time for my patience is gone"
FOURTEEN	11/13/2003	"Leah what is going on that you keep hiding from my call?"
FIFTEEN	12/04/2003	"Leah look into these laws and see what you think as you ignore me 100%"

In violation of Title 18, United States Code, Section 875(c)

A TRUE BILL

/s/ [Illegible]
FOREMAN, UNITED
STATES GRAND JURY
SOUTHERN DISTRICT
OF ALABAMA

DAVID P. YORK
UNITED STATES ATTORNEY
By:

/s/ Steven Butler
Steven E. Butler
Assistant United States Attorney

/s/ GS Vann
Gina S. Vann
Assistant United States Attorney
Chief, Criminal Division MAY 2004

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

UNITED STATES OF AMERICA	*	**CRIM. NO. 03-00236-CG**
	*	
v.	*	
RICHARD IRIZARRY	*	

STIPULATION

(Filed July 20, 2004)

With regard to the issues to be determined at the competency hearing scheduled to be held by this Honorable Court on July 20, 2004, the parties stipulate that, based upon the findings reported by their respective experts, it is not in dispute that defendant is not suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him. *See* Order entered February 20, 2003, at 1 (Doc. 20). The only issue remaining in dispute, and to be resolved at the competency hearing, is whether defendant is suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to assist properly in his defense. *Id.*

Respectfully submitted,

DAVID P. YORK
UNITED STATES ATTORNEY

/s/ Steven E. Butler
Steven E. Butler
Assistant United States
Attorney

7/20/04
Date

/s/ Lyn Hillman
K. Lyn Hillman
Assistant Federal Defender

7/20/04
Date

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA

UNITED STATES OF AMERICA

v.

RICHARD IRIZARRY,

Defendant.

CASE NO. 03-00236

COURTROOMS 2C & 2B

MOBILE, ALABAMA

JULY 20-21, 2004

* * * * * * * * * * * * *

COMPETENCY HEARING
BEFORE THE HONORABLE CALLIE V. S. GRANADE
CHIEF JUDGE, UNITED STATES DISTRICT COURT

APPEARANCES:

FOR THE GOVERNMENT:
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Proceedings recorded by
OFFICIAL COURT REPORTER

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[3] (July 20, 2004, courtroom 2C, 1:30 p.m., in chambers court, defendant not present.)

MS. HILLMANN: Good afternoon, Judge.

THE COURT: Good afternoon.

MR. WILLIAMS: Good afternoon.

MR. BUTLER: Good afternoon, Judge.

THE COURT: Good afternoon.

MR. BUTLER: We just thought if we could conduct a conference with you –

THE COURT: Excuse my chambers.

MR. BUTLER: I don't know if you know Brad Hicks. Have you met the Judge?

THE COURT: Yes, we've met.

MR. BUTLER: We have a stipulation –

MS. HILLMAN: Exactly.

MR. BUTLER: – which is at the point of this hearing with respect to competency. It just concerns the second prong, which is whether he's competent to the

extent he can assist in his own defense. The first issue is not in dispute.

MS. HILLMAN: Stipulated; right. And the other thing was that in talking with Mr. Butler, and in light of some of the evidence I think that's going to come out, I think he and I agree to put Mr. Irizarry on first, prior to either expert, because I believe it will come out in his testimony that he will change his behavior depending on what an expert will say [4] about him. So we kind of thought it would be best if he went on first. He's going to be talking about some things that may be a little off topic, but part of that is because, number one, he has expressed a very deeply held desire to talk about the case in this hearing. And even though I've explained what a competency hearing is, he wants his day in court. And I think it will help us with avoiding attorney-client problems if he talks about some things and –

THE COURT: Well, as long as there's no objection, I'll let him go on.

MS. HILLMAN: Great. I'm going to try to limit it a little bit. But he wants to do that.

MR. BUTLER: Because I think the issue of him going on and on is part of what Lyn's substantive point about this is, as well, in terms of: Should we go ahead and decide on the order of witnesses beyond your client?

MS. HILLMAN: That will be fine.

MR. BUTLER: We understand we have the burden by a preponderance, so we assume we could go ahead and call Dr. Buigas. But I'm not entrenched in that.

MS. HILLMAN: That's fine. And then Dr. Bennett and Dr. Buigas.

MR. BUTLER: Then what about you?

MS. HILLMAN: I'll be last.

MR. BUTLER: Okay. Okay.

[5] MS. HILLMAN: Okay.

MR. BUTLER: Thank you.

(In open court, defendant present.)

THE CLERK: Case set for competency hearing in United States of America versus Richard Irizarry, criminal case number other 03-236. What says the government?

MR. BUTLER: The United States is ready, Your Honor.

THE CLERK: What says the defendant?

MS. HILLMAN: We're ready, Your Honor. And Mr. Irizarry's name is pronounced Irizarry.

THE COURT: All right. Do the parties have an agreed order of presentation of the witnesses or should the United States go first?

MR. BUTLER: Your Honor, the parties have agreed that the defendant would testify first, and secondly Dr. Buigas in Miami, thirdly Dr. Bennett from here in Mobile, and lastly Ms. Hillman.

THE COURT: All right. Then you can proceed to put Mr. Irizarry on, please.

MR. BUTLER: Yes, Your Honor. And in addition, there is a written stipulation that we would ask be admitted into the record that this proceeding – that there's not any dispute whether he is competent to the extent he can understand the nature and consequences of the proceedings against him, but whether he can assist in his own defense.

[6] THE COURT: All right.

MS. HILLMAN: That is the agreed stipulation, Your Honor.

MS. HILLMAN: The defense would call Richard Irizarry.

THE CLERK: Mr. Irizarry, if you will step towards the witness stand, and I'll swear you in. Raise your right hand as best you can.

RICHARD ISRAEL IRIZARRY

was sworn and testified as follows:

THE DEFENDANT: So help me God, I do.

THE CLERK: Thank you, sir. Please be seated.

DIRECT EXAMINATION

BY MS. HILLMAN:

Q Would you state your name for the record, please?

A Richard Israel Irizarry.

Q And how old are you, Mr. Irizarry?

A I'm 38.

Q Okay. Are you the defendant in this case?

A Yes, I am.

Q Do you understand what we're here to do today?

A I believe I do.

Q Would you explain to us in your own words what you think the purpose of the hearing today is?

A Its – I'm going to be pleading to the case. And my understanding is that I'm going to have a chance not only to [7] plead but to, I guess, be interviewed and tell my side of the story for what I did.

Q Okay. Do you understand that another purpose of this hearing today is to determine your competency?

A Yes, I understood that, yeah.

Q Okay. And what part of your competency is in question?

A Whether I'm capable of helping my own defense, whether I understand the process and what these people are here to do.

Q Okay. And you understand that we've stipulated that you understand the roles of the various people in the process?

A Yes, I understood that. That is correct.

Q And prior to today, you and I talked about what you wanted to discuss in this hearing today?

A Yes, we have.

Q Okay. And you understand that anything you say could be used against you in a subsequent prosecution?

A Yes, I understand that.

Q And you also understand that to the extent you talk about things we may have talked about, the attorney-client privilege may be waived?

A Now I do.

Q Now you do? Okay. All righty. Mr. Irizarry, let's start back with your understanding of what you're charged with. Could you explain to us what you're charged with?

A Communication through emails, threatening emails.

[8] Q To whom?

A My ex, my ex-wife.

Q Okay.

A And several other people.

Q Okay. And over what period of time did you send those emails?

A The threats? I'd say within a period of maybe four months, the actual threats between – you can't quote me here, but I would say between August of 2003 and approximately the beginning of December of 2003.

Q Okay. And what was the nature of the threats, Mr. Irizarry?

A The nature of the threats?

Q What were you threatening to do?

A Well, I was threatening retaliation in a way, bombings, and take their life in different ways.

Q And what were your threats in retaliation for?

A Certain events that happened in the past.

Q And what were those events?

A Perjury, custody of my children, verbal threats, obstruction of justice on the behalf of my ex and her people, using treacherous ways of getting my family to do affidavits where they did not understand

what they were signing, they did not have the opportunity to read. Because of that, I lost my children. Also back in around July the 14th –

[9] Q Of what year?

A – of 2000 I didn't like something that they did to me. And it really – it really hurt me a lot and I could never put it behind me. It doesn't matter what I did. It was always coming up.

Q What was the something that they did to you, Mr. Irizarry?

A I had called my wife. She was my wife then. And I had called her to let her know that I was leaving to New York, that I was at Greenville, South Carolina, I was going to take a Greyhound bus. And I had left her a message on her voice mail and I told her that if she wanted to come with me and work things out, that we were able to.

That night around 10:30, my mom – she couldn't send me the Greyhound ticket. I don't know what happened. But the ticket was not there. So I ended up going outside, wondering what I was going to do, when I was confronted by two men in a '94 – '94 Honda Accord. And they wanted to talk to me. But the way they approached me was they came up to me and asked me if I knew where they could buy some drinks. I did not know where they could get some drinks. They –

Q In terms of drinks, you mean alcoholic drinks? Just regular –

A Beer, beer, like a bar.

Q Okay.

A And I told them that I know about a brewery that I had [10] seen, but I didn't know if it was open. And at that point he called my name out, "Mr. Irizarry." He waived a gun at me. He told me he wanted to talk to me. It was concerning my children. I wanted to run. I couldn't run. And I looked to the side. And then it was another guy in the back. And at that point I believed that I could have helped myself if I went with them.

Q And what happened when you went with them?

A The – they drove. They drove around a long time, for hours and hours. And the man was telling me things about a woman that him – him and his father, that they knew, and how they killed her and her baby because they didn't know whose child it was and how they had come across money.

Q Did there come a point in time when they harmed you?

A Well, as we were driving he was calling me Puerto Rican bitch. That's what he was calling me. And he was trying to put his hands on top of my hand.

And they kept bothering me, what kind of food did I eat that day, and he asked me if I was hungry and he gave me – I think it was $10. And he told me

that he's going to trust me to do the right thing, to get out of the car. And we went to this – like this family restaurant and he expressly told me what I was to order, which was french fries with no catsup and a dry hamburger. And basically he made me eat that stuff.

And they took me to this – like this warehouse. They [11] turned out the lights of the car. They made me get out of the car, took off my shirt, and some kind of gate opened and the lights went on. So they told me to jump in the car. And they took me to some house.

When I got to this house, I noticed it was like file papers everywhere. The house – there's no furniture in there, at least in the living room, that I saw. And the first thing he told me was go to the bathroom because he didn't want to get his – you know, his dick dirty.

Q Okay.

A And he told me to jump in the shower. And at that time I wanted to jump out the little window. Well, I didn't know it was little. I thought it was going to be a window that I could jump out. And actually it was a tiny window, and I couldn't get out.

And he told me why was I taking so long, that he didn't hear the water running. So he put me some – like these underwears, these silk red underwears, and he told me to go inside the shower.

So I went inside the shower. And I came out. And he told me if I try to fight him, that the guy that was in the back seat was from Vietnam and he was going to snap my neck if I try to fight him.

So at that point he made me jump into the bed and he just started like trying to come on to me and stuff. And he [12] told me if I would allow him, that I could speak to my children. And he proceeded to pick up the phone and he dialed some numbers on it. And then he said: "Oh, they are not there, they are not there. Just give in and we won't harm you or your children." At that time he came on to me and he took my legs and he opened them real hard with – I could hear like my hips snap. And he tried to –

MS. HILLMAN:

I want to let you know if you don't want to go into great detail about it –

A I mean, I feel that you should know.

Q Okay. Then go ahead.

A But I don't really feel comfortable.

Q Go ahead. Well, its up to you. If you want to just, I mean –

A I'm just going to tell you that after he did that, I did try to fight back. And him and the other guy – the other guy came inside the room and they put these blankets all over the windows. And he told me that he didn't want the neighbors to hear. Because if the neighbors heard and called the cops, then I'm

going to be in big trouble. And at that point the guy started biting my chest real hard, started biting my chest. And I wouldn't give in. And he grabbed my penis and he started punching me real hard on top of my stomach and around my groin area. And I was hurting real bad and I started to cry. And I [13] kind of like told him: "You know, let's talk about it. And what's this about?"

And he told me that I was to keep away from my – from my ex and my children. And then he tried to put it inside me. And it hurt. But I don't remember anything, because after that I started like just passing out. I mean, I couldn't take it. And I pleaded with him. And I couldn't take it. And the last thing that I remember after that was that I was on the bed. But I couldn't see. All I could do was hear.

And he pushed me off the bed and the other guy said: "We took it too far. We took it too far. What are we going to do now?"

So after that, when I was on the floor, I remember that I was just trembling. And I couldn't see. And the next thing, I passed out. And when I woke up it was like the sun was coming up.

Q Where were you when you woke up?

A I wasn't in the same place. I ended up maybe like six – like five or six miles, I would say, because I walked it, back to Greenville, on a bridge.

Q And did these men give you any indication who was responsible for your attack?

A No. They just told me that if I report it to the police, that my face would be on the newspaper and that it would be an embarrassment and they would know that I snitched on them.

[14] Q But they mentioned to you several times to stay away from your ex-wife and your children?

A They told me two times during the course of what happened.

Q And did this event lead to your decision to send some of these emails?

A Sometimes, sometimes. Not all the time.

Q What were some of the other reasons you had to send emails?

A Well, this instant I left the message to my wife and I had told her, you know, how come she had this done to me, and she –

Q So it was your belief that your ex-wife had this done to you?

A I – I don't know who else would do it, because she was the only one that knew that I was leaving to New York. No one knew that I was in Greenville. So yeah, I suspected her. But she left me a voice mail. And then around November 5th – 14th, 15th, and 16th of 2000 she called me and she told me that she cried for three days, that it wasn't her. And we talked and she told me certain things about the kids, that they were okay. And then after that I never heard

from her. She was supposed to call her mom and come back, and she never heard from her for a long time.

Q Okay. So she called you in November of 2000?

A Yes.

Q Okay. Mr. Irizarry, I'd like to show you what's been [15] marked for identification purposes as Defendant's Exhibit Number 1.

A Do I have to read this?

Q I just – I want you to basically look at it and answer some questions for me, if you would.

A Okay.

Q Do you recognize that document? Does that look something like you wrote?

A It's my handwriting.

Q Okay.

A I mean, I don't know what it says. But I've written a lot.

Q Okay. What's the date on it?

A 12/17/2000.

Q Okay. So that would have been after you spoke to Leah –

A Yes.

Q – the last time?

A Uh-huh (nodding head affirmatively).

Q And I want to direct your attention, if I could, to – I mean, you haven't read this letter in a long time; right?

A No. I wouldn't even know the context. I mean, I can see it already, but I wouldn't recognize it.

Q Okay. Was this part of the letter you wrote to Leah? It's just one page of it, there were other pages?

A I have sent her some letters, me and Anna.

Q Who's Anna?

[16] A Anna's our friend, Anna Rodriguez. Actually she's the one that came to South Carolina with me.

Q Okay. Was your brother not in South Carolina with you?

A Yes; that is correct, he was. My older brother, Efram. And also two children.

Q Who were the two kids?

A Anna's children, her daughter, Lilly, and her son, Juan.

Q And Anna, is Anna married to Efram or –

A She was his girlfriend. I introduced him.

Q Okay. Do you notice at the bottom of that letter, about the fourth line up, there's a word in all capital letters?

A Uh-huh (positive response).

Q What is that word to you?

A H-O-R, it's a whore.

Q What does that mean to you?

A A whore is someone that's unfaithful and does anything to get money.

Q Would there be any reason why you would use that term to refer to your ex-wife?

A Yeah.

Q And what would that reason be?

A Because when she was homeless in South Carolina with my son and my daughter, she resorted to being in a hotel with Mr. Kim, where he bought her groceries and all kinds of things. But she wouldn't accept my help at all.

[17] Q Who is Kim?

A Kim, to me –

Q Who do you know Kim to be?

A The Kim that I knew was in San Diego, California, on the computer. My wife used to chat on a Christian chatline and he used to bother her and they used to argue about religious beliefs. According to my wife, he was a Ku Klux Klan member who did not believe in the ways of Christianity. And my wife is

very smart when it comes to the Bible, so she would argue with him.

Q Now, is Kim a person you now know to be Kim Mertz or is it a different person?

A I did not know his last name.

Q Okay.

A All I ever knew was Kim.

Q Where was Kim residing?

A I wasn't too sure. The way that I found out was I put one and two together by things that my wife was telling me as far as where she traveled, and also my four-year-old son revealed much.

Q Okay. And what did you put together? When you say you put one and two together, what did you learn about Kim?

A Well, I learned that he was 42 years old, that he was going to school to become an attorney. I learned from Pearl and the Oswalts, Leah, and my son that he has several vehicles, the [18] types, the year and stuff, I learned that.

Q Did you ever figure out where he lived?

A Not exactly.

Q You never figured out if he lived in Alabama?

A I knew that it was in Alabama. But I – my estimate was Mobile.

Q Okay. Did you believe that this person – that your wife had left you for a relationship with this person?

A Not at first.

Q What made you believe that she ultimately did leave you for a relationship with this person?

A When you told me that she got married.

Q You didn't have any suspicions about her and Kim before that time?

A Her friends, the Oswalts, they told me and my son had told me. But I always suspected there was more to it, because I knew the type of person that she was.

Q In fact, you suspected that in 2002, didn't you?

A Yeah. I suspected there was more than what they told me that there was, actually that my wife had committed adultery. See, I never trusted her friends, the Oswalts. And they were the first – see, I didn't – okay. Let me explain this to the Court.

Q Sure.

A On July the 7th, I had no idea where she was at or where my [19] children was at. I was waiting to –

Q I'm sorry. This is July 7th of 2000?

A Yes, I'm sorry. That is correct. And the Oswalts, Jim and Susie Oswalt, and some people from Georgia, friends of theirs, Jeff and this woman – I cannot recall their names – they called my mom in California and they told her that they were looking for me, that they wanted to talk to me. They proceeded to call my friend Milotti, which is in that picture that you saw, and they told her that they wanted to talk to me. At that point they told me a lot of things.

Q Like what?

A They told me, first of all, that I had to come pick up my children because –

Q Now, this was Jim and Susie Oswalt?

A Yeah.

Q Okay.

A That I had to come pick up my children, that my wife was really neglecting the children, they were being abused, and because of the involvement of my wife in the Ku Klux Klan that the children would not be accepted and I should come out there immediately to pick them –

Q Why would your kids not be accepted?

A I'm not white.

Q You're Puerto Rican; is that right?

A Well, I'm Puerto Rican Basque.

[20] Q Okay. So after the Oswalts told you that your – this was in July of 2000 they relayed this to you?

A July the 7th.

Q And did you go to South Carolina?

A Immediately.

Q And when you got to South Carolina, were you aware of whether divorce proceedings had been filed there against you?

A Nothing was filed.

Q Had you filed anything in California before that time?

A No, not until I believe I came back in August.

Q Okay. So when you went in July, did you see Leah and the children?

A Yeah.

Q I mean, I'm sorry. It was in June when you went. Did you see Leah and the children?

A I got to South Carolina, I believe it was, July the 8th of 2000.

Q Okay. And did you see Leah and the children while you were there at that time?

A Yeah, I saw her, I saw the kids. We spent like four days together off and on.

Q And what was the nature of that time you spent together those four days?

A What do you mean, "the nature"? Like what did we do?

Q Yeah.

[21] A We was in church. That's where I met her. After that we went shopping for toys for the kids, she went for some clothes, we went out to eat dinner. We talked and she told me that this affair was over and that I could – that I could probably get some counseling and a job and remain in South Carolina and Jim and Susie would help us.

Q Okay. And she never – she was not afraid of you?

A If she was, she sure didn't show it. Because –

Q Has she made contact with you?

A She looked for me every day. I was in a shelter over there with the Geraldines and I believe I probably was there for like five days. And they were getting upset because – see, I ran out of money. I ran out of money. And when I was in this homeless shelter –

Q The homeless shelter was before –

A It was like three days after I saw Leah.

Q Okay. So you saw Leah and you spent four days with Leah and then three days later you ended up in a homeless shelter?

A Yeah, pretty much. I ran out of money because we were going out to eat and buying stuff.

Q How long did you stay at the homeless shelter?

A I would say four to five days.

Q And why did you leave the homeless shelter?

A Because my – my wife had told me that she wanted me to have a part in my children's life and she didn't want me to be [22] there, that she would get a job and I was going to stay in a hotel and babysit the children while she was at work.

Q And did you babysit the children while she was at work?

A We never got that far. But I did get to babysit my kids one night and part of a morning until afternoon.

Q Where was Leah living at this time?

A Clinton Manor Apartments.

Q And so did you babysit the children at her apartment at Clinton Manor?

A She told me not to go to her apartment, so I never went.

Q Why, why were you not to go to her apartment?

A She just didn't want me to go.

Q Okay. So where were you when you babysat the children?

A In the hotel.

Q Okay.

A I'm real cold. That's why I'm shaking.

Q It is kind of cold in here. I'd like to show you, Mr. Irizarry, what has been marked for identification purposes as Defendant's Exhibit Number 4 and ask you if you recognize that document for me.

A Yeah, I recognize it.

Q Okay. And that was written Wednesday, November 20th, 2002?

A That's correct.

Q Okay. And in this email I'd like to direct your attention to the second page. If you go about one, two, three, four, [23] five, six, seven, eight, nine, 10, 11 lines down, there's just the word "and" by itself.

A Yes.

Q And if you could, for me, read from the beginning of the word "and" on down to the end of that paragraph?

A "And the Oswalts' threat" –

Q No, not out loud. You can read it to yourself.

A Okay.

Q Okay. You read that whole paragraph?

A No.

Q Okay. We'll talk about it and you can refer to it if you need to.

A Okay.

Q This is an email that you sent to your ex-wife?

A Correct.

Q Okay. And in there you indicate that you will attempt to serve the Oswalts and Kim a restraining order?

A That's correct.

Q Why would you want to restrain the Oswalts and Kim?

A That's another story. When they invited me to South Carolina, I honestly, against my better judgment, I guess I trusted them. I needed to see the kids after what they told me. And the first thing that they asked me about when they called me at the airport, after they said hi, they introduced themselves, they started driving in their station wagon and [24] they were asking me about Leah's computer hacking of the Ku Klux Klan.

Q Now let me stop you right there. Tell us about Leah's hacking of the KKK.

A Okay. Before Leah left on the first time of May the 3rd, she had – she had come out from work – I used to take and pick her up from work. And one day she came out crying. And I asked her what's going on, that she didn't look, you know, the same, like usually. She was really upset and stuff. And she told me that she did something really stupid. And I asked her, you know: "What is it that you did? Did you get fired?"

You know, just – I never suspected anything so outrageous. And she told me that she had hacked into the American Knights, Ku Klux Klan computer literature, where they do all the postings of, I guess, informations and stuff about them. That she had put like a song from Prince about like rights and she had put stuff about Martin Luther King and freedom, freedom rights and stuff like that, on it and that they were looking for her all over the internet.

Q Okay. And at some point she became a member of the KKK?

A She had asked me to join them and she asked me to go to South Carolina with her. That's how I also knew that she was in South Carolina. Because prior to her leaving, she told me. But I just didn't know that she was in Clinton.

Q So it was your understanding that the Oswalts were [25] threatening Leah because she had hacked into the KKK computer?

A I don't know what their problem was, but they were threatening me.

Q With what?

A Like they were putting, putting me down in their house, that – and these several white women – that I'm just a piece-of-shit Puerto Rican.

Q Did they indicate they were members of the Klan?

A No. They did not. But they were – they were saying to Leah, like encouraging her to seek what she wants, live out her life.

Q So was Leah there with you and the Oswalts?

A Yes, she was. So were my children.

Q Okay. And you indicate Kim in this email, too. Is this the same Kim that you believe your ex-wife ran off with?

A This – I mean, really Kim is not – just a name. I never put a face on it. I never met Kim.

Q But yet you threatened to serve Kim with a restraining order?

A Uh-huh, yes, I did.

Q You must have had an idea of who he was?

A Well, I had the license plate numbers on his cars.

Q Okay. And what information did you develop from that, if any?

A I never used it. I just held on to it until I lost the [26] piece of paper that I wrote it on.

Q Okay. Why did you have the license plates numbers for his cars? Why did you get that information?

A Pearl. Pearl is her next-door neighbor in Clinton, South Carolina.

Q Okay. And what did Pearl tell you, if anything, about the way your children were being treated?

A Pearl used to talk to my mom and me the several times that she was there, and she would call me to tell me like one time that my four-year-old son was left on the doorstep sleeping and he fell asleep on the doorsteps.

Q And if you look on page three of the email we were talking about, the next page of that, that last paragraph in the next-to-last line, and you talk about we all suspect, including all your South Carolina "neighbors" – was Pearl one of the people you were referring to?

A I always referred to Pearl. Leah knew that.

Q So Pearl also had knowledge of her computer hacking into the Ku Klux Klan?

A She had knowledge of the KKK because all the neighbors and the management of the apartment, they used to talk about to Leah that Kim was a leader of the Ku Klux Klan.

Q Did there come a point in time, Mr. Irizarry, when your ex-wife stopped communicating with you?

A Yes.

[27] Q About when was that?

A After November, after November 16th of 2000.

Q Okay. And divorce proceedings were initiated?

A I initiated a legal separation in order to show custody in California, through the district attorney and the family court.

Q Okay. And – but your wife also filed in South Carolina, did she not?

A But that was months later.

Q But which court did the divorce end up being heard in?

A South Carolina, Clinton – I mean Laurens County Family Court.

Q And that was in Clinton, South Carolina?

A Laurens County.

Q Isn't Clinton in Laurens county? Do you know?

A It's the nearest court. It's a different county.

Q Okay. And in that proceeding your ex-wife said that you were abusive to her, didn't she?

A Yes, she did.

Q She said you were abusive to your children?

A That's correct.

Q Jim and Susie Oswalt said that you were abusive to your ex-wife?

A That's correct.

Q That you were harassing her?

A That's correct.

Q That you were stalking her?

A That's correct.

Q One of your brothers, your younger brother, Michael, filed an affidavit saying he had seen you be abusive to your wife?

A I haven't seen that affidavit from Michael.

Q Okay. Was it not in the discovery that I gave you?

A The people – it was his wife, Lora.

Q His wife filed an affidavit saying that?

A Uh-huh (nodding head affirmatively). Lora.

Q That she had seen you abuse your children?

A Yes; that's correct.

Q And –

A And her mom, too, Dominga.

Q And Elaine Smith also filed an affidavit, didn't she?

A Elaine Smith also.

Q Okay. Did you attend any of the hearings in South Carolina?

A I went to – I couldn't go to the first hearing.

Q Why not?

A Because they gave me like three day's notice and I didn't have the money. And I spoke – if I'm correct, I had spoke to my sister's attorney and she told me the first one's not important, for me not to miss the second one. So I did go to the second one.

Q I'm sorry. The attorney told you the first court hearing [29] was not important and you could skip it?

A Well, she told me that basically the first one, it's just going to be sort of like a stipulation and stuff like that where they are going to talk about the

charges and give her temporary custody, but for me not to miss the second one.

Q Okay.

A So I did go to the second one. It was –

Q Were you – I'm sorry to interrupt you. Were you served with your divorce papers while you were in jail?

A Yes, I was.

Q Okay. And where were you in jail?

A In Clinton, South Carolina.

Q And why were you in jail?

A I had – I had a restraining order and I knew for a fact that my wife wasn't – she had not lived in her apartment in Clinton and I wanted my brother to go to Anna – I mean to Pearl's – Pearl's home because Pearl was willing to testify about the neglect that she has seen and about the things that the Oswalts, Jim and Susie Oswalt, were spreading rumors about the Ku Klux Klan.

Q So when you went to the apartment complex, were you arrested?

A I never went to the apartment complex. My estimate – I mean, I knew that if I go to the apartment, that I could get in trouble. And that's like this long driveway. And I had [30] dropped off my brother

at the beginning of the driveway. But, I mean, it was like maybe a couple of blocks long.

Q And you were –

A I –

Q – you never – you were never in the vicinity of the Clinton Manor Apartments when you were arrested?

A No, I was not. I was actually maybe like two miles away, at a gas station.

Q And you were in the company of your brother Efram at the time?

A Yes; that's correct.

Q And you were arrested?

A Yes, I was. I was arrested –

Q Was this on May 15th of '01?

A Yes. That's right.

Q Okay. And what were you arrested for? Do you remember?

A The police, they went behind my car, in the front, and told me that I had broken the restraining order and they wanted – a man has saw me and he wanted to identify me. And –

Q Did they take anything out of your van at that time?

A No. Not – not yet.

Q Okay.

A They – they made me drive back to Clinton. Then when I put my foot on the ground, then they told me that I had broken the restraining order. But they told me –

[31] Q So the police made you drive back to the apartments so they could prove you had broken the restraining order?

A Yeah. And then after I put my foot down, they told me: "Now we got you. Now you broke it." But if it was up to me, I wouldn't have gone back. Because I never dropped my brother off that close to Leah's apartment.

Q Okay. Did they mention anything to you about you calling her on the telephone?

A No, they did not. I didn't have her phone number. I didn't have her phone number because every time I called, she never picked it up. So I couldn't leave a message or anything. So I believe that it was either not working – but I never called her. The last time that I spoke to her in South Carolina was like July, July the 14th or the 15th of 2000.

Q I thought you spoke with her in November of 2000.

A But that's because she called me.

Q Okay.

A I didn't have a way of communicating with her. Only she could communicate with me.

Q I want to show you, Mr. Irizarry, what's been marked as Defendant's Exhibit Number 2 and ask if you have ever seen that document before.

A No. This is – I haven't – no one showed me this.

Q You've never seen that in your discovery before?

A I've never seen it. But I do recall some of the stuff that [32] it says.

Q Do you remember asking me to find a police report from your arrest in South Carolina?

A Yes, I did. This is it.

Q Would this be what you were looking for?

A I haven't read it. But it looks like it, yes.

Q Why don't you read it? Not out loud.

A Okay.

Q Okay. And that basically says that your ex-wife filed a complaint because you had been calling her on the telephone?

A That's what it says.

Q Sending her emails?

A That's what it says.

Q And that she claimed you were not going to stop communicating with her?

A That I wasn't?

Q That's what she said, that you would not stop communicating with her?

A Well, I guess.

Q And that it took you from the time she left California until May 15th to find out where she was?

A That is not correct.

Q Okay. And she – so that's – that was when you were arrested and placed in jail?

A Yeah. Until June the 3rd or the 4th. I was in jail for 29 [33] days approximately.

Q All right. After the divorce proceedings began, you were aware that you were not supposed to communicate with your wife; is that right?

A That's – that's correct. I understood that.

Q And did you keep communicating with her?

A She used to find me. She used to, even when I was – when I was released from Laurens County Jail, she went to see me outside. She was waiting for me. She was waiting there to pick me up. And that's what I told you about Maxine. And I told Maxine that I didn't want to see her. And the sheriff, he told me that: "What is wrong with that woman?" That I just did 29 days because of breaking the restraining the

order; that he will go out there and arrest her if she gave me any problems. And she left. And she gave me her new phone number for me to call her. She called Lora and my brother Michael and told them that she was looking for me, that she was worried, that same night. So I told the deputies.

I was released around 10 and I asked them: "I don't want to leave. I want to stay here until the next day, because I'm afraid of the Oswalts and what could happen if you release me at night. I have nowhere to go."

So they told me to sleep. They have this kind of couch. And I went to sleep. And in the morning –

Q The couch was where?

[34] A Inside the jailhouse facility. I went to sleep there until like 1 in the morning because I didn't want to go outside until my wife left.

Q So she was waiting the entire time?

A She was waiting probably until like 11 o'clock. And Maxine went outside and said she was gone. But that she had left a message on a paper with her phone number and stuff.

Q And what happened to that piece of paper?

A They gave it to me and they – this officer took it away and said that he didn't want me to break the restraining order, so he stuck it in some kind of file cabinet. And he was really furious and he called her

and left a message on her phone saying that he wanted to talk to her, why is she looking for me.

Q Okay. Now, was this before or after the final hearing on your divorce that you attended?

A This is before.

Q And did you tell the divorce court about all these things that had happened?

A I didn't go to the divorce court.

Q You went to one hearing in divorce court, didn't you?

A Yeah. But not –

Q When was that?

A February, I think the 13th or 14th, of 2001.

Q Okay.

[35] A But I never went to the final hearing.

Q You indicated you were served with your divorce paper, though, in May of 2001, didn't you?

A If I –

Q When you were arrested?

A I don't recall that. Can you – you say that I was – the final papers I was served while I was incarcerated.

Q Okay. The final papers, not your notice paper saying: "Hey, your divorce is going to be in South Carolina"?

A Yeah. That's exactly that paper. That's the one I was served.

Q Okay. So did you get a copy of the judgment of the court saying: "The divorce is over and here's what I've decided"?

A I didn't get that paper until like three months later.

Q Okay. So start to finish, your divorce took three months?

A I have no idea.

Q Okay. And the restraining order was issued in January of 2001?

A Yes; that's correct.

Q Okay. And you got some paperwork while you were incarcerated in May of 2001?

A That is correct.

Q Okay. And when was your divorce final? Do you know?

A September.

Q Of 2001?

[36] A September 10th of 2001.

Q Okay. Which hearing did you attend, Mr. Irizarry?

A The hearing that I attended was concerning custody of the children and child support.

Q And when was that hearing?

A February the 13th, I believe, of 2001.

Q Okay. And at that hearing did you tell the judge everything that was going on with your ex-wife and the Oswalts and all these threats you were receiving and her overtures to you to come and see the kids and come and see her?

A I tried. He wouldn't listen to me. I give him a order to squash the motion of jurisdiction and he wouldn't accept it because he said I didn't file it in court.

Q Did you testify at that hearing?

A I couldn't talk. He told me without an attorney that I couldn't say a word. Basically I was just there to listen.

Q So he didn't allow you to testify?

A No. All he told me is that if I would challenge in his court that I would lose. That's what he told me.

Q So he told you before the divorce even happened that if you said anything, you were going to lose?

A Uh-huh (nodding head affirmatively). He told me not to challenge him in his court, that I will lose.

Q So why did you keep sending emails after September of '01, when your divorce was final?

[37] A Why? Because I was afraid.

Q What were you afraid of?

A My children's safety, the things that I had seen.

Q What had you seen?

A Like when I babysat, my daughter was missing some toenails, she had a massive knot on top of her head right here (indicating).

Q And this was when you babysat in 2000?

A 2001 (nodding head affirmatively).

Q What time during 2001 did you babysit?

A I think it was the night of July 8th, between maybe 8 o'clock at night and the next day?

Q It was July 2001 that you babysat your children?

A No, 2000. That was when I met her at church.

Q Okay. And your daughter was missing some toenails and had a knot on her head?

A My daughter was missing her big toenail and part of her other – you know, like on her feet, right there, the big toenail and this one here (indicating).

Q Okay.

A And she couldn't walk.

Q And she had a knot on her head?

A Uh-huh (nodding head affirmatively). Yes.

Q What did your ex-wife tell you about how those things showed up?

[38] A She told me that: "You know how kids are." And: "She was running and she tripped, and when she tripped she ripped out her toenail and hit her head on the curb at the same time."

Q And did you have any reason to disbelieve the story?

A Yeah. Because –

Q Which was –

A If – the way that it had pus on it and the way that her head – it was so big that my wife would have taken her to the hospital or at least a clinic to have her checked out. But instead she tried to fight me because I wanted to take her to the doctor and she told me no. And she refused and refused and refused until finally I gave in and we didn't take her to the doctor.

Q So after your divorce, you said you were sending emails because you were scared for your children. I want to show you – I think this is one of the last emails that you sent to your ex-wife. I'm going to show you what's been marked as Defendant's Exhibit Number 21. I'd ask you to read that for me.

A Okay.

Q Okay.

A I've read it all.

Q When you refer to "everything that (she's) kept in the dark and will make you wish (she'd) never crossed (you) or (your) children," what were you referring to?

[39] A It would seem to me, after all the emails that I have sent, that I told her I would pay child support. I told her I would go to counseling, that I would take whatever it takes, even to see my children one day out of the year in a police station and that I would pay for their medical. And she didn't want anything from me, not a thing. And that's all I wanted, because after what I saw and what I experienced, I was really afraid for my children.

Q But you say in this email: "Since you have not contacted me, expecting that (you were) bluffing." What were you bluffing about – or what do you think she thought you were bluffing about?

A Her mom.

Q What about her mom?

A Well, when I met the Oswalts, they said that Kim was after her mother's inheritance.

Q And who is Kim again?

A The man that she was with.

Q Okay.

A The man that I knew that with the computer, that was bothering her on the computer.

Q Okay.

A That's the only Kim that I know. I've never met Kim. I've never spoken to Kim.

Q Okay. And so when you say you were bluffing, what would [40] she think you were bluffing about? Her mother and doing what about her mother?

A She – you see, the thing with her mom, it's like because she had the children – I never knew if my wife was like okay. I even had suspicions that she might not be okay because of everything that's going on and everyone in South Carolina kept asking me about her mom's inheritance. And Leah herself told me that her mom was given five years of life and that she would perish. You know, she's going to die. So as the years went or from 2000, 2001, '2, '3, '4, I started believing, you know, what she had told me about her mom.

Q So what were – you know, you mention in here, saying –

A The bluffing.

Q Uh-huh (positive response).

A Because I told her that: "If you love your mom, you wouldn't allow me to hurt her. Like the toenails that my daughter was missing, I'm going to rip out your mom's toenails to see how you like it. The bump on my daughter's head, I'm going to put one on your mom's head to see how you like it, see how it will hurt you."

Q So you were basically saying in this email that –

A The bruises on my son's legs and my daughter's legs, that I was going to bruise her mom's legs and I was going to take a belt and I'm going to whip her mom on the back just like my children were whipped. I just wanted the truth.

[41] Q And so you thought Leah was – Leah thought you were bluffing about what you were going to do to her mother?

A Yeah. I think she did. I don't think she believed me because she knew better than that. She knows me. She knows that I wouldn't do those things.

Q That you would not?

A She knows that I would not (shaking head negatively).

Q So why would you write her a letter saying that you –

A Because I had to convince her. And it was getting harder and harder to convince her.

Q Of what?

A That what I would do if something happened to my kids, if they were in the same situation.

Q Okay. You also say in that same email that Leah should be ashamed of herself?

A Uh-huh (positive response).

Q Why should she be ashamed of herself?

A Why? Because we used to go to church a lot. She made this thing called like a tabernacle between me and her and God and she totally walked away from all, all her morals. You know, she contradicted herself and she started doing things that were like not right, just worldly things. And that's what being ashamed come out of.

Q When you say "worldly things," what do you mean?

A Like sleeping with my kids in a hotel with men for days at [42] a time and not coming out. Just allowing my children to witness her life, you know, the life that she chose after she left.

Q Okay. Mr. Irizarry, I'm going to show you a picture that the government produced today.

MS. HILLMAN: It hasn't been marked, Your Honor.

Q And I'd ask you to identify if you recognize that picture.

A I – I didn't know this picture was taken. But yeah, it was shown to me. It was shown to me by my family. It was actually given to me. They thought it was funny.

Q Do you know where that picture came from?

A I know the picture's in my brother's house. The date –

Q No. I mean, did you have that picture in your possession at any time?

A Uh-huh (nodding head affirmatively). Yes.

Q What does it say above –

A "Hor."

Q – Leah's head?

A "Hor."

Q What does that mean?

A Someone that's not trustworthy, someone that's cheap, someone that does whatever it takes to get what you want.

Q And did you mark Leah's face out?

A Uh-huh (positive response).

Q Why did you do that?

[43] A Why? Because she's a liar and I didn't trust her anymore and I was really upset.

Q Okay. When did you do that?

A I don't recall. But it must have been after I came back from South Carolina the first time.

Q Okay. And that was in your car when you were arrested?

A Yeah. I – I imagine it was, because I had all the pictures inside my car.

Q Richard, Mr. Irizarry, what was your intention when you sent your wife an email threatening to kill her mother?

A My true intention for that came – I never wanted to hurt anyone. The reason I did that is I wanted – especially Kim – I wanted Kim to know that if anything happens to my children, that I had someone that I can take it out against because –

Q And how were you going to take it out against him? Or were you going to take it out against Leah's mother?

A No. I believe in one of the emails that I had written her, I told her that they were using my children as pawns and that I would use her mom just the same way that they were using my kids, and if anything happened to them that I would definitely retaliate against Elaine Smith.

Q Okay. Why did you – did you allow yourself to be caught by the authorities?

A I wanted to, but not until I was ready.

Q Why did you want to be caught?

[44] A Because I exhausted the state – the state laws. Yeah, I tried to do this, you know, the way the state did it. You know, like go to the courts and stuff. But that wasn't working out. So I figured if I did something federal, that I could get an investigation launched into the allegations and, even if I served time, at least I'll find out about my kids and stuff.

Q An investigation of what allegations?

A All the emails, all the things that had happened.

Q That you've done?

A That she has done.

Q Okay. So your purpose in getting caught was to expose your ex-wife?

A Yeah. But it backfired. Well, kind of backfired. That was my intention at first, yes.

Q How did you expect your arrest to expose your ex-wife?

A I wanted a chance, by me being picked up, to tell the FBI. And possibly – I was praying that Pearl would testify. And when they heard what Pearl and her son and her neighbor, what they witnessed, that

the FBI would definitely be interested in it. Because it –

Q Interested in what? What did you hope the FBI was going to do as a result of this investigation they were going to start?

A Find out if my children were alive, find out if my ex was being forced by this man, find out exactly what's going on. The disappearance is too funny, and even people in my family [45] suspected that there was foul play.

Q So you think there was foul play in your ex-wife's decision to leave California?

A At first, yes.

Q Okay. Mr. Irizarry, I want to cover a couple of other things with you other than the facts of this case. There came a time when you were examined by Dr. Bennett?

A In Miami?

Q No, no. The one here.

A Yes.

Q The doctor that I sent to see you.

A Yes; that's correct.

Q When you talked to Dr. Bennett, were you honest with him?

A Definitely.

Q Did you tell him the truth about everything?

A Yeah. Why not?

Q Did you answer all of his questions?

A I believe I did.

Q Okay. And did there come a point in time when I showed you a report that he had prepared?

A Yes. I believe he did.

Q Okay. And I told you that he had diagnosed you with delusional disorder, didn't he?

A That is correct.

Q And how did you feel about that?

[46] A I felt that if I would have been reading – if I was in his shoes, I would have said the same thing. But because he didn't know all the facts, that his conclusion wouldn't have been right.

Q So if he had known all the facts, he would have done something differently or he would have been correct?

A He wouldn't have been correct. He's definitely wrong.

Q Okay.

A He arrived at that conclusion because he never had a chance to hear other people state the facts about what pushed my buttons, what made me act the way that I did. If I was delusional, it was

thanks to Jim and Susie Oswalt and Mrs. Leah Smith.

Q Okay.

A Because I was going based upon what they were telling me and also what my son had told me.

Q And so after Dr. Bennett wrote his report, you and I talked about the fact that you would be going for a competency evaluation somewhere else?

A Yes; that's correct.

Q And you ended up going to Miami?

A That is correct.

Q And when you got to Miami, you were interviewed by Dr. Buigas and his staff?

A That is correct.

[47] Q Okay. Did you tell him the truth about everything?

A Yes, I did. And I even volunteered more information than I did. Because, as I had told you, I'd been experiencing like nightmares and stuff. And I figured since I'm there, that I might as well try to get to the bottom of this and try to help myself while I'm at it.

Q Were there things you didn't tell Dr. Buigas that you had told Dr. Bennett?

A I believe that there's several things that I did not disclose.

Q Which were –

A Basically my assault. I don't recall me telling him about that.

Q And why would you keep that from him?

A Because it was my understanding that I was there for a competency hearing, not for emotional support or nothing like that. I was just there to basically know if I'm capable of standing trial.

Q Okay. And so you didn't feel it was important to mention that to him?

A No. I wanted to, but it kind of hurt. I hate reliving it. And I felt, since I'm not there for that, I'm not going to put myself through that hell.

Q Okay. Is there anything else that you decided not to tell Dr. Buigas because you were uncomfortable with it?

[48] A No. I actually – me and him actually talked a lot for a few hours about relationships in the past, my family, and I told him a lot of things that have always bothered me. So I volunteered a lot of personal information and I mentioned to him that you had told me that I could – I have like bipolar and that I had gone to like some kind of hospital place and they told me that I was manic-depressive, but it was not conclusive.

Q So you told him you had been hospitalized psychiatrically before?

A Yes, I did.

Q Okay.

A I told him all the places, I believe.

Q Did you tell him about the abuse of your children at the hands of your ex-wife?

A Yes, I believe I did.

Q Did you tell him about her involvement with the Klan?

A Yes, I believe I also did that.

Q Did you tell him about the police in South Carolina stealing the proof you had of abuse of your children?

A No. I don't think I told him that.

Q Okay. Why don't you tell us about that? Did there come a point in time when the South Carolina police confiscated some evidence you had?

A Yes.

[49] Q And what was – briefly describe that for us.

A Films, films that my brother had taken, these films.

Q You're talking pictures or movies?

A Pictures.

Q Okay.

A Pictures, like just pictures.

Q And what do those pictures show?

A It showed the inside of Leah's apartment through the windows, and day after day no one was living there for like two weeks at a time.

Q Okay. And why were you taking those pictures, Mr. Irizarry?

A I wasn't taking them. It was my brother.

Q Why was your brother taking them?

A Because I wanted to prove to the court that the apartment was basically vacant, and which is set up to obtain jurisdiction, that she was never a bona fide resident to have jurisdiction for custody. It was a hoax on her behalf.

Q Okay. Was this one of the evidences of perjury –

A Yes.

Q – on the part of your –

A That's correct. And the police took that film away from my brother and told him that he was trespassing and he had to forget about the kids forever, and never come back to South Carolina. And

they took the camera and arrested him. And that [50] was on the same day that I got arrested.

Q Was that May the 15th?

A Yes.

Q Okay. Do you remember taking a bunch of tests for Dr. Buigas in Miami?

A A lot of tests.

Q Did any of those tests have questions like: "What is your marital status?"

A Of course. Yeah. I wouldn't – yes.

Q What would your answer have been on those questions?

A Divorced.

MS. HILLMAN: Divorced? Okay.

Your Honor, can I have just a moment?

THE COURT: Yes.

MS. HILLMAN: Your Honor. We pass the witness. Oh, I'm sorry, Your Honor. Before we do, we'd like to admit Defendant's Exhibits number 1, 2, 4, and 21 and we would ask to be allowed to substitute a copy of the picture the government brought today, that this is their original.

THE COURT: You need to give it a number, though.

MS. HILLMAN: What number do you want to give it? We can call it 3.

MR. BUTLER: Sure.

MS. HILLMAN: Because I didn't use 3.

MR. BUTLER: Sure.

[51] MS. HILLMAN: We'll mark it as Defendant's Exhibit 3.

MR. BUTLER: No objection.

THE COURT: Mark them in.

(Defendant's Exhibits 1, 2, 3, 4, and 21 were entered into evidence.)

CROSS EXAMINATION

BY MR. BUTLER:

Q Good afternoon, sir.

A Good afternoon.

Q My name is Steve Butler, and we've met before. You know I'm the federal prosecutor who's handling your case; is that your recollection?

A Yeah.

Q Okay.

A I'm fine.

Q And I believe Ms. Hillman, your attorney, asked you about whether you understand the charges

that have been filed against you in this case; is that correct?

A That's correct.

Q And I believe that you did testify that you understand that you've been charged with making threatening interstate communications to your ex-wife; is that right?

A That is correct (nodding head affirmatively).

Q Right. And you know that you were indicted for this case back in November of last year; is that right?

[52] A That is – well, actually in December. December the 4th, when I –

Q I think you were arrested in December perhaps, but indicted in November, is that your recollection?

A If you say so.

Q And since that time a superseding indictment has been filed against you; is that correct?

A Yes.

Q And you've read that indictment?

A I believe I have. I have it in my possession, yeah.

Q And you've had discussions with your attorney, Ms. Hillman, about possible defenses to these charges; is that right?

A Explanations.

Q Right. And has she been forthcoming with you, in your view, about how it is that you could go about defending this case?

A (Pause.) For the most part, yes.

Q And have you been forthcoming with her in return about what you know about the case?

A Yes. I believe that there's mutual agreement. She has considerably helped me a lot and I have helped her by volunteering a lot of unknown information.

Q Is that because you've perceived your role as the client in this case to provide full and complete information to your attorney?

[53] A Come again?

Q Is that because you understand your role as the client in this case to be to give your attorney full and complete information about what you know?

A Yes. I don't want any – any surprises. So I put it on the line.

Q And she's helped you in this case, hasn't she?

A Actually it's my idea, yeah.

Q And so you do understand what this case is about, and let's talk for a minute about whether you understand what this case is not about. Okay?

A Okay.

Q Do you understand – or do you agree or disagree, rather, that this case has nothing to do with Leah's life with Kim?

A I agree.

Q And any path that they choose to take in their lives together; is that right?

A I agree.

Q And do you understand that this case has nothing to do with whether Leah committed adultery against you when you were married to her?

A I definitely agree.

Q And would you also agree that this case has nothing to do with whether Leah was a bad wife to you or has ever been a bad mother to your two children?

[54] A I definitely agree.

Q And would you also agree that this case has nothing to do with whether your two children – and I believe you have a little boy and a little girl; isn't that right?

A That's correct.

Q – whether your two children have been well cared for since you've been separated from Leah?

A Yes. I agree.

Q In other words, Mr. Irizarry, this case is really not about punishing Leah for anything; isn't that right?

A That is correct.

Q It's about whether you have violated federal law; is that right?

A That has been understood, yes.

Q All right. And I understand from, reading your emails as the prosecutor in this case and from listening to your testimony in this hearing, that you sent these emails, one reason of which was to extract some revenge against Leah; isn't that right?

A In a way, yeah, mental. Mental, yes.

Q But that's revenge that, in your mind up until this day, you have not had an opportunity to carry out; isn't that right?

A Oh, I've had plenty of opportunities.

Q Tell me about that.

A Well, for one, in South Carolina, when she used to come to [55] me when I was back home, I always – I mean, I know where her mom lives, where she works, her schedule. I knew that she was in Mobile. I know that Mobile's not a big place. I – I did

some research. I mean, I knew if I wanted to find them, I could. That was not a problem for me at all.

Q And do you also understand that this case has nothing to do with whether anyone, your ex-wife or Kim or any of their friends, have been involved in any white supremacist organization?

A I understand that.

Q And you've understood these things all along since you found out about this case that was filed against you; isn't that right?

A I found that out after – after I talked to Mrs. Hillman.

Q I see. And were you under the – well, do you remember when you were arrested?

A Of course, yes.

Q And that was in December of last year; is that correct?

A Yes. December the 4th of last year.

Q And that was in Orange County, California?

A Escondido.

Q Right. And you were arraigned there; correct; in federal court in the Southern District of California?

A Okay. Yes.

Q And you were eventually brought here; is that right?

[56] A That's correct.

Q And prior to the time that you arrived in Mobile, did you think that this case was about these other things that we've been talking about – that we've now established, you understand, that the case is not about?

A I knew that I would be tried for my crime. But I also wanted – I wanted some information about my kids, which I got.

Q Has Ms. Hillman helped you obtain that information?

A Yes. So did the D.A.

Q Sure. And has she helped you understand the charges that have been filed against you and what your potential defenses may be?

A Yes.

Q And she's helped clarify in your mind what the case is not

about?

A Yes, definitely she has.

Q And that includes the things that we just talked about; isn't that right?

A She told me that since, I believe, the first time that I saw her.

Q Now, you know that Leah has not brought this case against you? You understand that as well; right?

A Yes.

Q And that the United States of America that has brought this case?

[57] A Yes.

Q And that Leah didn't have anything to do with whether the United States decided to bring these charges or whether a grand jury decided to indict you; isn't that right?

A Yes, I understood that.

Q And that she's nothing more than a witness in this case?

A Yes.

Q Now, do you believe, as we sit here today, that Ms. Hillman is in your corner as your advocate in this case?

A In other words, is she in my best interest?

Q Sure. That's another way of putting it.

A Yeah, she's representing me. I believe that it's her sworn duty to give me representation and legal advice.

Q Do you know the office that she works for?

A I – I got her address, I think, on the card she gave me with her phone number.

Q If I told you she works for the office of the federal public defender here in Mobile, would that comport with your recollection?

A Yes; that is correct.

Q And do you know that that office represents defendants in this court who cannot afford representation?

A Yes; that is correct.

Q And that's all they do, is defend people who are in your situation or some situation similar to it?

[58] A That is correct.

Q And do you believe that she and I are in any sort of conspiracy against you or that she has taken any position in this case contrary to what's in your best interest?

A No. I know her job and I know your job. And I trust her. You do your job and she does hers. That's as far as it goes.

Q And you understand that, although Ms. Hillman and I have a good professional working relationship which is important to both of us, that we are adversaries in this case; right?

A Yes.

Q And although that my job as a prosecutor is to seek justice, but it's not necessarily to be on your side; isn't that right?

A That is correct.

Q And you also understand that the judge and her staff, as well as the entirety of the judiciary here, is impartial and unbiased in this case; isn't that right?

A Yes, I agree.

Q Now, you talked a little bit about when you were in South Carolina and that you had an attorney there. What was the name of your attorney in South Carolina? Do you remember?

A No. My attorney was in Alabama.

Q Okay. Who was that?

A I don't recollect. I don't remember his name at this point.

[59] Q Do you remember what town he was in?

A I believe it was close to Birmingham.

Q Okay. Do you know if that would be written down anywhere or documented in some way?

A Emails.

Q I'm sorry?

A Most likely in my email. One of them should have a phone number.

Q Have you ever had a problem communicating with – strike that.

Let me ask you this: Prior to our case here, you had attorney representation with regard to your issue in South Carolina; is that right?

A I didn't have the – he was assisting me. I never – I never was allowed to hire him.

Q Have you ever retained an attorney to assist you before?

A I tried many, many times in South Carolina.

Q Okay. Prior to South Carolina, when you were just going about your life in California, both before and during your marriage to Leah, did you ever have occasion to have representation by an attorney?

A Yes.

Q Okay. And how many times?

A We have a family attorney, Rochelle Glenn (phonetic). She was able to assist me regardless if it's $200,000. She is our [60] family attorney. She could not, however, take the case because it was in South Carolina and she cannot work that jurisdiction.

Q No, I understand. The point of my question was to understand whether you've had any problems communicating in the past with any attorneys who represented you in other situations.

A Not pertaining to this?

Q No. Nothing to do with this case. Have you ever had any problems communicating with an attorney who's represented you in any other situation in your past?

A I've never been in trouble to know. I've never been in any trouble.

Q Now, as I stand here today as the prosecutor, I don't know whether – I don't know how this hearing is going to come out. And beyond that I don't know whether you intend to take this case to trial or whether to plead guilty or what your position is going to be. In the event that this case goes to trial in this court before Judge Granade and a jury, are you prepared to work with Mrs. Hillman and do your job as a client and let her do her job as your attorney?

A Definitely, just – yes.

Q All right. Do you have any legal training at all?

A I – the only training that I have is not through education. I spent numerous days and hours studying family laws of California and South Carolina just pertaining to this [61] particular case that I was trying to find, about divorce and stuff like that.

Q But you've never been to law school; right?

A No.

Q And you under – would you agree that you have two very important roles as a client in this case; would you agree that one role is to provide full and complete factual information to your attorney?

A Yes. That's my role.

Q And would you agree that another role is to decide on some rational basis whether or not to testify on your own behalf at trial?

A Yes. I understand that.

Q And I believe you testified earlier that you have provided full and complete information to Mrs. Hillman; is that right?

A That's correct.

Q And you haven't withheld anything from her; is that right?

A Nothing, nothing. Nothing at all.

Q And to your knowledge, she hasn't withheld anything from you about what her intentions or her strategy is in this case; is that right?

A That is right.

Q And on the issue of whether to testify – and I'm not going to ask you, of course, what your intentions are. But do you believe that Ms. Hillman has been able to help you begin the [62] process of trying to decide what you would do in that situation?

A Yes.

Q And has she been helpful to you?

A Lately, yes.

Q Okay. What do you mean, "lately"?

A We had several options that she has represented and it was up to me to choose in my best interest.

Q Okay. And do you feel good about the choices that she's made available to you?

A Lately, yes. She could not make any choices, because I didn't know what route I was going to go. All she could do is propose to me my options.

Q Are you prepared, as her client, to allow her up to and during trial to talk to you about this and consider her point of view?

A Oh, most definitely.

Q And you understand that, as an attorney and a member of the bar, Ms. Hillman is not allowed to take certain positions at trial because of ethical constraints or court rules or rules of evidence and issues of that nature; isn't that right?

A I understood that already, yes.

Q Right. And so she's the expert on the legal issues and you're not; right?

A That's correct.

[63] Q Right. And so you would be willing to defer to her on those issues; right?

A Yes, definitely.

Q Okay. I believe that – let's talk about the medical reports just for a moment. I was a little confused. You were talking about your conversation with Dr. Buigas in Miami?

A Uh-huh (nodding head affirmatively).

Q And you were also talking about your conversations with Dr. Bennett here in Mobile; right?

A Yes; that's correct.

Q And who did you say you were able to spend more time with?

A Miami, definitely.

Q Okay. And how much time do you remember that you were able to spend with Dr. Bennett here in Mobile?

A I – I said between maybe an hour and a half, maybe two, give or take. Don't quote me.

Q Sure. Did you feel that there was some information that you had wanted to convey to Dr. Bennett but were not able to do so?

A No, not at all. I simply answered his questions.

Q And with respect to Dr. Buigas, I believe that your testimony is that, although you spent more time with Dr. Buigas, you did not tell him about – and I'll call it the rape incident in South Carolina; is that right?

A That is absolutely correct.

[64] Q Now, would you agree that you don't really know whether Leah or Kim or anyone that they know or are friends with actually is a member of the Ku Klux Klan; isn't that right?

A I don't know a hundred percent.

Q I mean, you could be wrong; right?

A Unlikely, but yes.

Q And you also – would you agree that you don't really know, for example, whether your daughter lost her toenail and got a knot on her head because she was injured deliberately by Leah, you don't really know what happened in that situation, do you?

A No. But her explanation did not match the incident. Because she refused to take her to the hospital or the doctor.

Q Right. Now, your view is that that would be bad judgment on the part of a parent; is that right?

A Either bad judgment or concealing.

Q But be that as it may, you still don't – I mean, she could be telling the truth; right?

A Sure.

Q She could have just exercised bad judgment?

A Possibly.

MR. BUTLER: I don't have anything further. Thank you.

REDIRECT EXAMINATION

BY MS. HILLMAN:

Q Mr. Irizarry, Mr. Butler asked you if you had given me full [65] and complete factual information during the course of your case?

A (Nodding head affirmatively.)

Q Okay. Has there ever come a time where you've asked me to look for particular items of evidence or to interview particular witnesses?

A Yes.

Q And have I come back and told you what the results of my investigations were?

A Yes.

Q And have I told you that I've been unable in many circumstances to find what I'm looking for?

A Yes, yes.

Q What do you attribute that to?

A The fact that you cannot find?

Q Right.

A At first I thought that you were limited.

Q Limited in what way?

A Your discovery, what you're able to find out as far as from witnesses and things of that nature, I would imagine.

Q Let's talk about some things in particular.

A Sure.

Q Do you remember in the beginning you asked me to go and find some papers that were in your car –

A Yes.

[66] Q – that would prove that Leah was threatening you?

A Yes.

Q And do you remember me bringing those papers and showing them to you?

A You brought me several pieces of paper, yeah, from my file.

Q And were those letters that you had written or letters that Leah had written?

A There were supposed to be some letters that my family had given me from Leah that she had written.

Q To you?

A Yes.

Q Okay. And I informed you I was unable to find those things, didn't I?

A Yes. But then again, that's not my only file. That's not – I mean, that's a good portion of it.

Q Where are your other files?

A I believe I have more stuff in storage.

Q Okay. Did you tell me you had other things in storage?

A No, I did not.

Q Okay. You also indicated to me, didn't you, that I would find cards and letters Leah had written you in your car?

A Yes.

Q Did I tell you whether I could find those or not?

A I believe you told me you did not find them.

Q Okay. What do you attribute that to?

[67] A That they are misplaced, because those – that particular Christmas card was given to me by my sister and everyone in the family received one. I do not know about that – that card or the pictures that were enclosed. My family actually withheld it. They did not want me to have it. And after a few days

they decided that, yes, it was good for me to see my children.

Q What do you think happened to all of this missing information, the things that were in your car that were supposed to have been in your car?

A That folder there? I throw a lot of things in there, as you can see. Even letters, thoughts that I write, I put them inside there. I like to keep things, especially about the kids and stuff like that. When I went to South Carolina, I had another folder that was also missing, that it could be possible that some of that information was inside those folders.

Q Have you ever indicated to me that those folders were stolen by law enforcement?

A Yes, I did.

Q Is it your belief that law enforcement has withheld information?

A No. Correction: Not law enforcement. When my vehicle got impounded, a lot of my – well, not a lot. Everything was missing out of my car, my van.

Q So the South Carolina police never took anything from you?

A My brother.

[68] Q They took something from your brother?

A Uh-huh (nodding head affirmatively).

Q The FBI never took any information out of your car?

A I don't see – no, I doubt it.

Q You've never claimed that?

A The FBI?

Q Uh-huh (positive response).

A Not that I recall. I don't see why they would.

Q You've never claimed that there's a conspiracy to destroy evidence that might help you?

A Yes, I did.

Q Okay. And when was that?

A I believe upon my arrest.

Q You haven't claimed that since then?

A I still claim that.

Q That the FBI or law enforcement in general has withheld information favorable to you?

A The South Carolina, Clinton police, yes.

Q What about the FBI?

A No, because they wouldn't have any knowledge of the past.

Q Okay. So if – but wait a minute. The FBI wouldn't have any knowledge of the past?

A They only know what they either read or what I disclose to them out of my mouth.

Q And you told them that your ex-wife was a member of the [69] KKK?

A Yes.

Q That she was involved with Kim Mertz?

A I told them Kim I did not know.

Q Okay. That your children were being abused?

A That is correct.

Q That you had written to various talk show hosts –

A That's correct.

Q – to try to get your story out?

A That is correct. The last time that I wrote was actually upon my arrest. That's what I was doing when I was arrested.

Q That you wanted your ex-wife to feel actually – did you refer to Leah as your ex-wife or your wife when you spoke with the FBI?

A My ex-wife. We were divorced in September of 2001.

Q So if they had written this up – have you seen the – I've showed you the report that they wrote from your interview, haven't I? You've seen that in your discovery?

A Yes. Well, a lot – well, not a lot – numerous things the person that wrote them, dates and stuff, they're not correct.

Q So there's inaccurate information in here?

A I would say so.

Q If they said you were repeatedly referring to your wife, that would be incorrect; it would have been your ex-wife?

A That would be incorrect. Even the emails, I would believe [70] that they say it was my ex. I mean, we're divorced.

Q Have you and I discussed what a guilty plea would mean in this case for you?

A Yes, we have.

Q Do you recall a conversation that we had at the courthouse when your competency hearing was originally scheduled? It was in the – on the second floor in the visitation room?

A We've had several.

Q I'm talking about in this building.

A No, I –

Q And I came over and discussed with you the difference between a plea and a trial?

A I don't recall.

Q Do you remember telling me that day that the FBI was withholding information as part of a conspiracy to let your ex-wife win?

A If I told you the FBI, that would be incorrect. It's the South Carolina police.

Q Did you tell me that if you pled guilty, your ex-wife would win?

A Yes.

Q Okay. Did you get very angry during that meeting?

A I believe I did.

Q Did you feel like you were being treated unfairly?

A Not from you. Not – not from people in Alabama. It's [71] just the law of South Carolina, yes, definitely.

Q Okay. So you saw the laws in South Carolina directly affecting what was going on here?

A Yes.

Q So there was a connection in your mind between your divorce and these proceedings here?

A Okay. Come again?

Q Okay. Was there a connection between what happened in South Carolina and these proceedings here?

A No. I think it's totally two different scenarios, two different cases.

Q Okay. Did you indicate to me that all three news networks would cover your trial?

A I was living in Huntsville for a while and I had spoken to a woman out there. And she was definitely interested, if this ever went to trial, that she wanted the results, if in fact there was a police conspiracy, yes.

Q Did you indicate to me –

A Yes.

Q – that all three networks would cover your trial?

A Yes.

Q Did you indicate to me that you had written four novels regarding this situation?

A Four novels? I write, but I've never written – the only one that I started writing, I used not Alabama, but New [72] Orleans. I got into the south. I love to write. But I've never written stories about this at all.

Q Did you tell me that you had a job waiting for you when you got out of custody?

A Yes, yes; that's correct.

Q And what is that job about?

A On real estate.

Q With? Who has arranged that job for you?

A My sister –

Q And what were you to be paid?

A – and Richard. An amount has not been established.

Q Okay. When was the last time you indicated to me that you wanted to go to trial?

A Possibly a little over two weeks ago.

Q Okay. You've indicated that you wanted me to interview certain witnesses; is that right?

A That is correct.

Q And you wanted me to interview Pearl?

A Yes.

Q You wanted me to contact the South Carolina Child Prospective Services?

A Yes, Melissa.

Q And have I done those things?

A I believe you have.

Q Okay. And what were the results of those, what did I find?

[73] A You told me that Pearl told you that she didn't know anything. Correct? And you never told me about Melissa.

Q Okay.

A That was kind of odd there in the balance.

Q Okay. And you indicated that lately I've been – you and I are kind of on the same page with regard to your defense?

A That's correct.

Q Were we not on the same page previously?

A No.

Q Okay. In what way?

A Because I was unsure of my decision. So it was up to me to weigh. I mean, you gave me options and I – I wasn't sure what route I was going to go.

Q Now, Mr. Butler also asked you if you agreed that the case had nothing to do with Leah or nothing to do with her adultery or the abuse of your children?

A That's correct. And I'll say again that that is correct. It has nothing to do –

Q But your whole point in doing this was to expose Leah's involvement with the Klan –

A To expose –

Q – and her abuse of the children and all of those things?

A That was my intention, yes, at the beginning.

Q What is your intention of testifying here today?

A What is my intention?

[74] Q Uh-huh (positive response). Why do you want to tell all of these things?

A Because it seems like no one believes me about these things. And once I do my time or I get out of here, then I'm going to go fetch that information that you have not been able to obtain for whatever reasons and I aim to take it to a civil trial.

Q Is there a possibility that I can't find the information because it doesn't exist?

A That is absolutely wrong.

MS. HILLMAN: I don't have anything further, Your Honor.

RECROSS EXAMINATION

BY MR. BUTLER:

Q And, sir, you talked about documents that you had asked Ms. Hillman to try to find, that she wasn't able to find.

A Documents and witnesses; that is correct.

Q Right, right. Do you blame her in that situation or do you think that she did her best effort to try to find them?

A She definitely did her best effort.

MR. BUTLER: Nothing further.

THE DEFENDANT: Thank you.

THE COURT: You may step down, Mr. Irizarry.

MR. BUTLER: Your Honor, the United States would call Dr. Rodolfo Buigas in Miami.

[75] THE CLERK: Dr. Buigas, if you will stand, please, and raise your right hand and I'll swear you in.

RODOLFO BUIGAS, Ph.D.,

was sworn and testified by teleconferencing as follows:

THE WITNESS: I do.

THE CLERK: Thank you. Please be seated.

DIRECT EXAMINATION

BY MR. BUTLER:

Q Sir, state your name for the record and spell your last name, please.

A Yes. You're coming in and out a little bit. But from what I can hear, my name is Rodolfo Buigas. I'm not sure if you asked me to spell it or not.

Q Yes, please.

A What else did you ask me?

Q To spell –

A R-O-D-O-L-F-O, last name B-U-I-G-A-S.

Q Can you hear me okay now?

A Yes. It comes and goes.

Q Okay. You are in the title of forensic exam coordinator with the U.S. Bureau of Prisons; is that correct?

A That's correct.

Q And how long have you been in that position?

A I've been with the agency since 1994. I did my first year of internship, which is our ninth year of training, and then I [76] did an additional year at another site in the Bureau of Prisons as a resident, and then I've been at this current site for approximately eight years.

Q And do you have any supervisory duties there at FDC Miami?

A Yes. I – I supervise another forensic psychologist, another post doc, a resident in forensic psychology. And I also serve as the clinical training director for psychology graduate students usually in their seventh or eighth year, at this time somewhere between five and eight students.

Q And other than forensic psychology, do you have any professional specialties within the realm of psychology?

A Yes. I also do neuropsychology, sometimes for the criminal cases and I also run a private practice. Almost exclusively neuropsychology. We can have brain damage, disease, that sort of thing. And I also just finished up another graduate degree in psychopharmacology this June, just last month.

Q And is it true that you're paid on salary by the Bureau of Prisons and you're not paid specifically by the case, or for this case?

A That's absolutely true. For all my criminal work I'm on salary.

Q And approximately how many competency determinations are you involved in on an annual basis on the average?

A Well, forensic evaluations for the U.S. courts, a hundred to 120. However, the issues vary to some degree. The [77] overwhelming majority involve competency to stand trial. However, about half also involve criminal responsibility, and there's some other lesser issues that come up, such as competency to stand trial and diminished capacity.

Q In the course of the years when you've been rendering competency-related assessments, have you had occasion to give a diagnosis that a particular inmate suffers from a delusional disorder persecutory type?

A Yes.

Q And is that something that happens often or is that rare or what?

A I would consider it rare, or at least very unusual. The prevalence – the best estimates in any given year in a population, it's approximately three in 10,000.

Q So, but you are familiar with the diagnosis that's entailed in that; is that correct?

A That's correct.

Q And do you have a client in this case; and if so, who is that?

A Yes. My client for all the – for forensic work, for the federal work, is the judge. They are the ones that order me to do the evaluations. It's not the prosecution nor the defense. However, after I do render an opinion, I'm usually called – not usually – less than 10 percent of the time I'm called by one side or the other, most of the time, although I have been [78] called as well by the court.

Q Now let's turn our attention to Mr. Irizarry. Do you recall him being at your facility, FDC Miami, a number of months ago?

A Yes.

Q And you conducted a competency assessment of him; is that correct?

A Competency and criminal responsibility.

Q Right. And do you recall the date that he arrived at your facility and the date that he left?

A Yes. I'm referring to my notes. He – I believe he arrived on March the 9th, and I'll tell you the date of his departure. Yes. Its March 9th he arrived, and he departed May 18th, both of 2004.

Q And I believe your report indicates that approximately eight hours were spent rendering interviews and examinations to Mr. Irizarry; is that right?

A That's correct.

Q And who on your staff, who at Miami other than you, was involved in that?

A Right. For what I included in the eight hours it was myself and one other graduate student. However, there were – there was an additional contact by staff psychiatrist and there were other contacts by Bureau of Prisons psychologists not at the current facility. The staff psychiatrist was at the [79] current facility.

Q Tell us briefly about the assessments made at other facilities.

MS. HILLMAN: I'm sorry. Could he identify what other facilities they were?

A Sure. If I heard the question correctly – I'm sorry?

MR. BUTLER:

Q Yes. Were there – where were other assessments made and who conducted those?

A Yes. There was – looks like there was three different psychologists who interviewed the defendant on different occasions. One of them, I believe its – I have the abbreviation of the institution – I want to say San Diego. I could be wrong on that. But anyway, it was the chief psychologist on 12/5/2003; he was also seen by a different psychologist in Oklahoma on 12/19/2003; and he was seen by a third psychologist on May – I'm sorry – March 8th, 2004, also in Oklahoma.

Q And moving back to your unit there at FDC Miami, was there anyone involved in assessing Mr. Irizarry – and I'll call him the defendant from here on out – other than you, the graduate student, or the psychiatrist?

A In rendering any opinions? No. However, I did consult with other staff –

Q Okay.

[80] A – in rendering my opinion.

Q Okay. Tell us about that briefly, please.

A Sure. The defendant – in fact, all the defendants are undergoing this type of evaluation with the exception of the females. We have – about 10 percent of our population are females. Although male defendants undergoing this type of evaluation are housed

in a special unit, it's actually 20 feet away from the psychology department, and I routinely consult the staff that monitored the inmates, that monitor the inmates on a 24-hour basis. I consult with a whole host of staff, from the correctional officers, to the unit staff, to even medical or even dental, if I have to, to let me know how – to give me an idea of how the inmate is functioning. You know, we're not directly in contact with psychology or mental health staff.

Q Okay. In your report you indicate that eight – excuse me – about six batteries of tests were conducted of the defendant; is that right?

A Yes.

Q And in addition to that, clinical interviews and a medical status exam; is that correct?

A Mental status examination. However, he did undergo a medical evaluation as well, which I incorporated in the report.

Q Okay. Let's talk about the clinical interviews for a moment. Do you know how many interviews were conducted, by whom, and how long those interviews lasted?

[81] A Yes. I'm only including myself and the graduate student. He was seen – in a span of about a month he was seen four times. Once was March the 11th, by myself, for approximately an hour and a half; the second time March 19th for approximately two hours, where the graduate student did the testing exclusively; third time, April 9th, for about one point

– one hours, 45 minutes by both the grad student and myself; and finally April the 12th for about two and a half hours, and that was exclusively myself.

Now, that's not including, I believe, a March 12th evaluation that he underwent by the staff psychiatrist for medication evaluation purposes.

Q Can you tell us briefly what the medical status exam is?

A The mental status exam? That is – essentially the actual questions are – they range from a really formal or structured approach to a very unstructured approach. However, it's a series of descriptors that mental health professionals use to essentially communicate to each other. So in other words, we share definitions of various terms. In other words, we describe the person's orientation, usually called sensorium. We describe a person's thinking. We describe the person's mood, range of emotional expressions, behaviors, psychomotor functioning, things of that nature.

Q Okay. In moving on to the six different tests that were conducted, the MMPI, what does that stand for and what's the [82] purpose of that?

A The name, the acronym, stands for Minnesota Multiphasic Personality Inventory, and the 2 means second edition. This is a test that consists of 567 questions which are answered in a true and false format. The defendant, the examinee, can either read it or it can be played on an audiotape, or actually

CD-ROM also. And essentially the person self-administers the test. This test looks at psychiatric symptoms and personality characteristics. And it also includes built-in indices. And what I mean by an index is a series of questions grouped together. You achieve typically one score, and they have been validated. In other words, the research is validated for different purposes. And these indices which I referred to are on test taking; in other words, how the examinee – in this case the defendant – approached the test, whether he was being truthful, defensive, exaggerating psychiatric symptoms, whether he was answering randomly, whether he was answering in a true manner, an acquiescent style, it all follows – things of that nature.

Q What if anything was revealed in the defendant's responses to the MMPI?

A Yes. The defendant invalidated the test for clinical interpretation. And what I mean by this, he achieved a high elevation on this one scale that – its called the L-scale, the Lie Scale. But essentially this scale looks at – it's a [83] very – it's an unsophisticated approach towards how you are presenting to the world. And elevations on this mean that you are defensive and essentially trying to portray yourself with unrealistic morality or virtue. I'll give you some examples of questions. Please understand that these are not exact questions. These are examples which –

Q Okay.

A – will be things like: "I never think bad of anybody."

So, you know, the typical person would endorse that, yes, in fact from time to time they have that fault, that human frailty. So anyway, the defendant achieved an elevation that invalidated all clinical interpretation on this measure.

Q What is the Kaufman Brief Intelligence Test? Just what is that and what's the purpose of it as it relates to this?

A Yes. The Kaufman Brief Intelligence Test is just what it says; it's a brief measure of intelligence. Depending on how you classify it, somewhere between two to three sections in the test, and this is used routinely for when you just need a much briefer estimate of the person's intelligence, and you don't really think there's any real neural degenerative processes and such a brief intelligence test would suffice.

Q Did he render a score of showing average intelligence?

A Yes. He fell in the average range –

Q Okay. And then the next –

A – which most people fall into.

[84] Q I'm sorry. And then the next test Booklet Category Test, is that a test that assesses brain impairment such as brain damage?

A Yes, it does. The Booklet Category Test – I'm sorry?

Q No, no. Go ahead.

A I'm sorry?

Q Go ahead. You were telling us about the purpose of the –

A The audio's coming in and out, so I don't know when you necessarily stop a question. I'm sorry about the interruption.

Q I'm sorry.

A The Booklet Category Test is a test that looks at neurocognitive functioning. It's actually a test from a much more comprehensive battery of tests, but it's completely valid to be given by itself. And this is very sensitive to overall brain functioning. However, it's specifically described for frontal lobe functioning, executive functioning. But it is sensitive to all kinds of neurocognitive conditions. In addition to that, it also has some built-in indices addressing whether the person was exaggerating neurocognitive impairment.

Q Okay. Now, the next item or exam that was rendered to the defendant is referred to as the Georgia Court Competency Test, Mississippi State Hospital. Considering that this is a competency hearing, could you explain what this test is all about, whether it's valid, and what the results were?

A Yes. This test is, as you mentioned, a test that directly [85] assesses knowledge and, you know,

potential abilities relative co competency to stand trial. And it is – it essentially falls in line with the Dusky standard, which is a federal standard for competency to stand trial. And this test was valid and the defendant – it's 21 items, and they range in the level of structure. Some of them are very structured items and some of them are relatively semistructured. The scoring goes from one to 100, which is both the raw score and a percentile – or percentage. I'm sorry. The defendant achieved a percentage of 90. This, the cutoff for incompetence, is usually 70 or actually below 70. I'm sorry.

Q So considering that he scored a 90, how would you interpret that within the contexts of whether the defendant is competent to stand trial?

A Well, the defendant, like the many studies that went into the validation and reevaluation of this instrument – and by that I mean that it was proven to be effective – persons who scored 70 and above were overwhelmingly found/determined competent by the courts at various levels, state and federal. So this falls in line with the suggestion that this defendant is most likely competent. However, that's the Court's determination. I can only render an opinion.

Q Now, with regard to the Georgia test specifically, is that something that is just proprietary information, that you are – that you have at your availability? Or is that available to [86] psychiatrists and other medical professionals across the country at large?

A The test, this test – this is somewhat unusual in our field in the behavioral sciences. The test is actually nonproprietary, which means that you can get it for free from various articles, you can photocopy it unlimited, and it is available to anybody who, I guess, subscribes to the journals that it has been published in. Over the years there's been, I would estimate, at least a couple of dozen studies sort of proving and reproving the effectiveness of this measure.

Q And moving on, the Personality Assessment Inventory, what is that?

A This test, every description I gave you about the MMPI applies to this one. So essentially it's looking at personality and psychiatric functioning and how somebody approached the testing. It's a little bit shorter than the MMPI. It knocks off approximately 200 questions. But it's also extremely valid. Okay.

Q And in the event MMPI results are rendered invalid for whatever reason, would the PAI be a good alternative to that or a reasonable alternative to that?

A Yes. I think so. Because, from what I recall, the defendant took the MMPI, I believe, on the first day of my contact with him. And, you know, there was about a month span in between my first and final contact. I knew that the MMPI [87] was invalid for clinical interpretation. So I thought, you know, maybe I should give him another shot to give me some useful

clinical interpretation. So I gave him the PAI. Unfortunately, the same results. There was – he approached this with a defensive manner that invalidated it for clinical interpretation. In fact, the scale that corresponds to the L-scale – not exactly, but approximate – is called the PIM. And that's in (unintelligble) names – it's called, it stands for Positive Impression Management Scale. So, and he also elevated other scales; for example, the Defensiveness Index and things of that nature. So it was also invalid for a clinical interpretation.

Q And I'm just curious: In the event that the defendant had rendered valid MMPI results before you, would you have taken the step of rendering the PAI?

A You know what? No, I wouldn't. There is a decision tree that I go through in my psyche testing. The MMPI is an outstanding instrument, probably the most commonly used psyche test in the world, validated in about – it's been translated in 40 to 80 languages. I've never known the PAI to add additional information, what we call incremental validity. So if that would have been valid for clinical interpretation, no, I would not have rendered any additional psychiatric or personality symptom test.

Q And lastly, the Rogers Criminal Responsibility Assessment [88] Scales, what is that?

A This is a – it's a rating scale for the clinician to use. While the clinician can – it doesn't actually have questions that you ask the examinee or the

defendant. This is something that throughout your course of your evaluation you gather information and at some point – it could be at the end, usually – you – the clinician does a rating based on other information he's gathered. And this test has been validated to coincide with the court's rulings on insanity, criminal responsibility.

Q Now, considering that at this point in the proceedings against the defendant we're in a competency hearing and that this competency hearing is limited to only whether the defendant is competent to the extent he can assist in his own defense, which of the various tests that we've talked about would go in or did go into your assessment of that issue?

A I'd have to say that to varying degrees every one of my procedures, the tests and other procedures, went into my opinion. However, some of them relate more directly than others. Obviously tests of legal knowledge, comprising the definition of competency, is very relevant. But then again, you know, tests such as the MMPI or maybe even the IQ test does render some more indirect evidence that can be used towards my opinion.

Q Now let's shift gears a little bit to what your diagnoses [89] was.

THE COURT: Mr. Butler, while you're shifting gears, could we take about a ten-minute recess?

MR. BUTLER: That would be welcome, Your Honor. Thank you.

MR. BUTLER: Doctor, we're on a little break for a few minutes.

THE WITNESS: Okay. Thank you.

(A recess was taken.)

(In open court, defendant present.)

THE COURT: All right. Mr. Butler, you may continue.

MR. BUTLER: Thank you, Your Honor.

Q Dr. Buigas, can you hear me?

A Yes.

Q Okay. Thank you. We'll continue. We were just transitioning into the issue of what your ultimate diagnosis was in this case with regard to the defendant's mental condition. Can you tell us what that diagnosis was?

A Yes. I assigned two diagnoses, the first one on – first of all, let me back up a little bit. I used the diagnostic classifications of the DSM-IV-TR. That stands for Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision. This is the latest version of this system of classifications that is used in this country. This is essentially the bible which mental health professionals of all [90] disciplines use.

On axis one, which is the clinical syndromes, I gave a diagnosis of anxiety disorder NOS, which stands for not otherwise specified. An NOS diagnosis can be found in all diagnostic clusters, and it essentially means that I believe the individual or the clinician believes the individual has that type of disorder; however there's some degree of diagnostic uncertainty within that classification or that cluster. So, for example, I'm saying he has an anxiety disorder but I'm not exactly sure which one of the more specific anxiety disorders he has. Either he wasn't exhibiting the full manifestation of the condition or there was some question as to the etiology, the cause and/or causes, or, you know, maybe the person wasn't being as forthcoming as you'd like. So there could be a number of reasons why the clinician has some uncertainty towards this.

I gave this particular assignment because I believe Mr. Irizarry presented it and has a modest history of both sort of a mixed depression and anxiety symptom manifestation. And even though it's called anxiety disorder, it actually allows for a mixed anxiety and depressive symptom classification –

Q Let me just stop you right there.

A – (inaudible) – going to why I assigned this particular – I'm sorry?

Q Let me just stop you right there briefly and just digress [91] on the point for a moment –

A Sure.

Q – before you explain the bases for your diagnoses. A mental disease or defect is different from a personality disorder, a mood disorder, or an anxiety disorder; is that correct?

A I can't answer that question simply yes or no. Mental disease or defect is, to my knowledge, strictly a legal definition. The clinical syndromes – the Axis 1 in DSM comprise a variety of disorders such as mood disorders, psychotic disorders, and things of that nature, anxiety disorders, and a whole host of others. This is what mental health professionals agree that is essentially what most people think of as a mental illness. This is something that, you know, literally you cannot have throughout your whole life and from one day, one week, one month to the next you develop it, something like what everybody – something that everybody can recognize as depression, major depression; you can be fine for 30 years and then within the next few days you develop your first major depressive episode. So that's what an Axis 1 of a mental illness is typically considered in this country.

Axis 2 is something that is much more longstanding, some things that have always been there, such as a personality disorder or even a developmental condition such as mental retardation. You don't wake up one day and you're mentally [92] retarded. As far as personality disorders, what you have now you had 10 years ago and you're going to have 20 years from now. You might be a little more set in your ways, but they are always going to be with you – if that answers your question.

Q Now – and I believe I interrupted you – I believe I interrupted you when you were about to explain your basis for the Axis 2 diagnosis for borderline personality disorder, if you could please explain that?

A Sure. The Axis 2 diagnosis that I gave to this individual, to Mr. Irizarry, was borderline personality disorder with paranoid and antisocial features. Borderline personality disorder, you know, if I had to summarize this in one line, is instability in pretty much every domain. As a matter of fact, in assisting me at arriving at this diagnosis, I actually went to quite a bit of detail with different symptoms with the defendant, Mr. Irizarry, and he gave me some examples of each of the criteria for this diagnosis.

By the way, I didn't finish talking about how I arrived at my diagnosis for anxiety disorder, because this also plays into it a little bit. But since I've gone on to borderline, I'll go ahead and talk about that. But again, it's instability which is pervasive and global, instability in a number of areas. In borderline personality disorder, there's a total of up to nine symptoms. However, you don't – you only need about half of those to meet the criteria.

[93] I'll give you an example. The first criteria is frantic efforts to avoid real or imagined abandonment. You know, I discussed this with the individual. And by the way, I'm referring to my notes from my conversation with Mr. Irizarry. So he would give me examples of this, although I'm not still sure that,

relating an example, that one is necessary in this case. It seems pretty obvious.

The second criteria: A pattern of interpersonal relationships, of unstable interpersonal relationships. He also gave me many examples of that. I think he's had three relationships – all, I would say, of modest length – and they all fluctuated from extremes in, you know, from overidealizing to devaluating the person with this individual.

Let's see. We also discussed the third one, unstable self-image. I saw that, although the defendant in this case denied that one. That was the only symptom he denied, although I did see that. I think there are some fluctuations in his self-image, going from a more healthy to low self-esteem. And you also – I think you also saw that in the multitude of writings that I was provided.

The next symptom is impulsivity in at least two areas; however, not including self-harm gestures. This is addressed in another symptom. The defendant indicated to me that he had impulsivity in a variety of areas, including substance abuse and in speaking. And I think you can probably see that as well [94] in his email and telephone conversations.

The next criteria is recurrent suicidal gestures. The defendant did tell me about prior recurrent ideations of thoughts about suicide. And there was at least one, from what I recall, at least one suicide gesture in which he overdosed. To me he couldn't recall the medications. However, in one of the notes

from the other psychologist, I believe from Oklahoma, he – I think he told that person that it was with Vicodin, essentially an analgesic, a pain medication.

Next symptom is affective instability. This is where the emotions are all over the place. And this is – you know, a lot of people are referred to as "this person is very moody, he's bipolar." That's actually completely incorrect. When you see a volatility in emotional expression between minutes, hours, days, typically what you're talking about is this right here, the borderline features of a personality. Sometimes mental health – basically it's just unstable. I won't go into more detail than that. But they typically are much more short lived than, say, a bipolar episode.

Next, chronic feelings of emptiness. This is interesting. This is a very subjective criteria, something that I usually refrain from even addressing. I really don't know how I can assess if somebody has chronic feelings of emptiness. However, the defendant told me he endorsed this symptom and told me how he feels about this, how he feels like [95] he's a burden to his family and not really worthwhile.

And finally, the last criteria for just borderline personality disorder is transient stress-related paranoid ideations, especially suspiciousness. The defendant said he received this sometimes. I have to tell you that I saw this a lot more than sometimes with the individual. And it's very global, pervasive, chronic and stable. In fact, I saw it so much more that I don't think that one criteria of borderline personality

disorder did it justice, and that's why I tacked on the features of paranoid personality disorder. And this of course has this other symptom cluster, which you can do by DSM, you can have a specific personality disorder with other features added on to it.

And somebody who has paranoid personality disorder and/or features is somebody who – a number of criteria – somebody who suspects exploitation without justifiable basis.

Somebody who, again, without proof to the contrary, doubts the loyalty of friends and acquaintances, family members.

Is reluctant to confide in others.

I'm just going down the list of criteria here.

Reads hidden, demeaning, or threatening messages in events or remarks of others.

Persistently bears grudges. I think we can have a pretty good example of that one here as well.

[96] Perceives attacks on his reputation – his or her reputation.

And recurrent suspicions of fidelity of significant others. And, in fact, I believe most of these criteria – just to address the last one, in the three relationships that Mr. Irizarry discussed to me, infidelity was an issue in all three of them, based on his accounts.

And finally I threw in the added feature of antisocial simply because this individual has a history,

although a modest history, I have to say, of asocial activities, some legal difficulties, although not severe from the context that I usually work in; and also he talked to me about some conduct disorder problems when he was a kid, multiple fights. He talked about being involved in this gang, although it didn't seem to be a very serious gang in the sense that they got into too much trouble. He talked about just, you know, a whole bunch of behavioral problems at school. And the reason that's relevant is to actually diagnose antisocial personality disorder you have to establish a pattern of something called a conduct disorder pre-age 15. So I think a lot of those symptoms go into the conduct disorder at issue in his past.

And those were essentially the two diagnoses that I assigned. However, the defendant did discuss with me prior substance abuse. I believe it was methamphetamine or crystal meth, cocaine – and I believe it was powder cocaine – and [97] alcohol.

The periods that he disclosed to me, it seems like they were intense but brief, although there were several episodes of each. However, they were not current, from any information I could gather, and there didn't seem to be a pattern of impairment based on the substance abuse. And that is important for a diagnosis of abuse; for example, cocaine abuse. And something even more, a sort of more serious side of the cocaine or the substance abuse, would be substance dependence. However, I didn't see any of those physiological or psychological symptoms necessary for diagnosis of a substance dependence. It certainly is

something I would consider, the abuse, if I had collateral information to that effect. But I did not have that, so I did not assign any substance abuse or dependence diagnosis. But if I may for a second, let me get back to the anxiety disorder.

Q Yes, please.

A The reason I assigned that was, by the defendant's account, he had a modest history of mental health treatment. I believe there was two episodes of brief psychiatric hospitalizations; the first one, I'm going to say, was in 2000. The first one was a three-day hospitalization, and the defendant indicated that he was treated with antidepressant medications and he was given a diagnosis of adjustment disorder. Adjustment disorder is essentially a condition that there's an identifiable [98] stressor. And I believe in this case it was his ongoing marital conflicts. And certainly the child – the lack of contact with his children. But anyway, he was given a diagnosis of adjustment disorder, which typically comprises the serves in depression and/or anxiety and sometimes behavior as well.

Then the next treatment was – I do have this in my notes – was in September of 2002, and this was a 10-day hospitalization in California. And he indicated that he was diagnosed with bipolar disorder and treated with paroxetine, Paxil. However, I believe there was – there was some confusion in that account simply because you are not treated with simply an antidepressant if you're diagnosed with bipolar

disorder. In fact, you can be quite dangerous if you're given only an antidepressant. And again, this one was a 10-day hospitalization and he was discharged.

And finally, I think there was some treatment in a county jail, and I did not catch the name of the county jail that he was in. And again he was treated with two antidepressants: Paroxetine and trazodone. Paroxetine is Paxil. And trazodone. The defendant did tell me the dosages of the paroxetine but not the trazodone. When he came over to our facility, he was continued on the paroxetine 40 milligrams. However, at some point he – on his own he discontinued taking the medication. He said he felt better [99] when he saw the psychiatrist, our psychiatrist, which, by the way, diagnosed him with depression in remission. The psychiatrist, on the defendant's urgings, discontinued the – all medications. So somewhere along the point of the evaluation he was no longer on any psychiatric medication, although he did remain on some medications for minor medical conditions.

Q Okay. And so that explains the bases for your diagnoses. And at the time that you began your assessment of the defendant, didn't you have the benefit of reviewing a report that had been prepared by Dr. Thomas Bennett from here in Mobile?

A I did within the context of the entire evaluation. I probably did not have access to it in my initial contact.

Q Okay. Did you eventually, during the assessment period when the defendant was at FDC Miami,

did you have occasion to read Dr. Bennet's [sic] report and consider the findings and conclusions in it?

A Yes.

Q Okay. And you would note that in his report his diagnosis of the defendant is different than yours; Dr. Bennett has diagnosed the defendant with a delusional disorder persecutory type; is that correct?

A Yes.

Q Yes. And do you have a viewpoint as to whether you believe [100] that that diagnosis is appropriate or warranted?

A Yes. I do not agree with that diagnosis.

Q And why is that?

A I'm not sure if I heard you. Did you ask me why is that?

Q Yeah, why is that? Yes, sir. Yeah. Why do you disagree with Dr. Bennett?

A Sorry. Yes. Well, I'll tell you, in contrast to – well, there are several points of contrast. One is – essentially the sole criteria for diagnoses of a delusional disorder, regardless of the type, is delusion. Mental health professionals describe – define "delusion" as an irrational belief in the face of contradictory evidence. And whereas I wholeheartedly agree that this individual is paranoid, he's suspicious, I do believe it's always been there. It's present in a global

context, it does not reach the level of delusions, and it's very stable.

In fact, from the defendant's own accounts, you know, pretty much he questions the motivations of others in a variety of contexts – and very stable over time. He would tell me things from essentially all of his relationships. You know, I described some of those symptoms earlier of the paranoid features of a personality disorder. And he questioned the loyalty, the fidelity as well, of all his spouses.

He did this with coworkers. He was telling me about this one job where he had – it was a brief job. In fact, all [101] of his jobs were relatively, relatively brief. I think some lasted as much as a year or so. But he was working with a family member and he had reason to doubt the – essentially the integrity of that other individual. He would tell me this about – about essentially nearly everybody he's come in contact with at some point or another. He really second guessed them. And I think this is a hallmark of a paranoid personality.

Q Let me ask you this: Does the long-term nature of his behavior, as you have diagnosed, is that really the key difference between what you've diagnosed him with having, and him having a present slate of delusional – a delusional disorder at this time?

A I think it can absolutely be key. A personality disorder is much more longstanding. It would have

been there 10 years ago and it will be there 10 years from now. Essentially you can look at the stability, the longstanding nature of it, and also the global nature of it. It won't really apply to one situation. It will apply to, you know, many if not most situations. So definitely.

Q During your assessment, or rather during the clinical interviews of the defendant, did you have an occasion to learn about his childhood and the chronology of his life from that time to the present?

A Yes. The defendant was very cooperative with me and he [102] gave – he gave a pretty detailed background of himself.

Q Right. And does that paint a picture of him being an ill tempered person throughout the years and, if so, if you could explain how that would relate to your assessment?

A Sure. I'm not entirely sure that I agree with – well, not agree – that I understand what ill tempered is. But for example, a criteria of borderline personality disorder, the prominent diagnosis that I gave him, is essentially intense episodes of anger, uncontrollable anger, with very slight, if any, provocation.

The defendant told me about, for example, going back to his adolescence at least, many episodes of getting into fights in school. He felt he was being picked on by children. He told me about disagreements with coworkers, he told me about disagreements with significant others, he told me about

disagreements with his attorney. I mean, there's nothing new here and, you know, it's not really going to change.

Q And is a component of having a delusional disorder that you believe one or more delusions that are fixed false beliefs; is that a fair way of defining that?

A Yes. Typically – typically, but not exclusively, they are – there's one really encapsulated belief system. However, I should point out that one of several types of delusional disorders is called the Mixed Type, so there can be more than one. But essentially it is very much encapsulated, it revolves [103] around just one area, and essentially everything's incorporated in that. And for delusional disorder, I should say it's typically nonbizarre. And what mental health professionals mean by that is that it could actually happen, it could actually be real in the sense that, you know, you believe your wife is cheating on you, is a great example. It's not a bizarre delusion such as, you know, aliens came down and kidnapped you and – I don't know – performed surgery on you. That was what we would consider a more bizarre delusion, and that's more of a hallmark of other types of psychotic disorders, such as schizophrenia.

Q Assuming that the defendant has a delusional disorder, based on that, would he be expected to tell everyone he comes into contact with the same story or recite the same facts, so to speak?

A I believe so. I think, you know, unless it's a casual, brief contact by somebody else. I think if you spend enough time with an individual, those components, if it's that well entrenched, those components should come out, yes.

Q And if the defendant told Dr. Bennett and his attorney about being essentially held hostage, beaten, and raped in South Carolina, would that be a significant event that you would expect him to tell you as well, if it indeed were an aspect of a delusional disorder?

A I think so. But I think a bigger issue is I would have [104] seen, you know, some – the individual facts are less meaningful than the overall theme or overall delusion – the belief system. And I think, you know, a long enough contact, especially by a mental health professional, is going to pick up elements of that delusional belief system.

Q Okay. And as you know from reading the myriad of emails that the defendant sent, as well as all of the other discovery information that you've been privy to, would it be fair to say that the defendant's estrangement from his children and his separation from his – and divorce from his wife has been a traumatic episode in his life?

A Yeah. I believe divorce and estrangement from children would be traumatic for anybody. However, I absolutely agree that this individual has taken it particularly hard.

Q Right. Why would not the way that he has gone about writing these emails and so forth be evidence of or be conclusive evidence of a delusional disorder in your view?

A If I understand your question correctly – again, I miss the beginning of every question – you said: Why would his writings not be indicative of delusional disorder?

Q Right.

A Is that correct?

Q To the extent those writings would address a very traumatic event in one's life, which is separation from your children and divorce from your wife?

[105] A Yes, I think the writings do a very good job of detailing this sort of pervasive resentment and anger and suspiciousness, and also other symptoms as well.

For example, you know, essentially in relatively brief periods in his writing you see him going from this overidealizing his wife to devaluating her to the extreme. We call this sort of a black and white; you know, one moment somebody's the best thing since whatever and the next moment, you know, they're a demon. That's a hallmark symptom of borderline.

And the defendant did this throughout the writings. And in fact, did this throughout my contacts with them. He would initially talk about how somebody was – he was seeing that person as favorable or

was on his side and then would progress to say how that person was really out to do him wrong in some way and in fact, you know, would go back and forth. And in fact I saw it as well in some of his testimony today.

Q And you know that Dr. Bennett rendered his own version of the MMPI; is that right? I shouldn't say his own version of the MMPI.

A Yes.

Q He himself rendered the MMPI himself; is that right?

A Yes. That's what I understood.

Q And have you had an opportunity to review the results that Dr. Bennett obtained?

[106] A Yes, with a caveat, that caveat being he actually did not provide me the raw data, as I provided him. He provided me a hand-scored profile sheet that gives me approximate numbers of some of the scales. So I have reviewed the one page that he provided me and it gives me a general idea of the results.

Q And what is the general idea of the results?

A Yeah. His profile is equally invalid. In fact, for the exact same reason. In fact, the L-scale, that scale that I talked about prior, was even elevated to a greater extent on his, rendering all clinical interpretation meaningless.

Q And would the elevations in the MMPI rendered by you as well as by Dr. Bennett indicate that he suffers from any type of psychosis?

A Well, the simple matter is once a profile is rendered invalid – in other words, if a person didn't approach this with an honest response style, then by default you cannot look at the clinical scales. This is a very basic principle in psychological testing, in graduate school you learn. And in fact there's no research study that will contradict this.

And I must tell you the MMPI probably has tens of thousands of studies out there. And I'm talking about this version, not even since it's history in '43. So essentially you really cannot look at the clinical scales, the clinical symptoms.

Q Now let's shift gears again for a moment. Let's focus for [107] a few minutes on whether the defendant can assist in his own defense in this case.

A Sure.

Q Even assuming that Dr. Bennett is correct in his diagnosis, which is different than yours, would that necessarily mean that the defendant could not assist in his own defense in this case?

A If I heard you correctly, you said: Assuming that Dr. Bennet's diagnosis was correct, would that necessarily translate to an opinion of incompetency?

Q That's true.

A No, it would not. The – regardless of the diagnosis, let's face it, diagnosis is a psychiatric/psychological issue. The Court has legal criteria. So it does not translate automatically. It would somehow – the symptoms present would in some way have to directly impact the legal criteria.

Q And during the clinical interviews that were conducted of the defendant, did you have an opportunity to discuss with him or to determine from your discussions with him whether he has the ability to relate all the pertinent facts of his case to his attorney?

A Yes. In fact, I think he does. The defendant proved to be a pretty good historian with me, able to provide a lot of detailed information, although there certainly was some mild confusion which, you know, is pretty common. And I absolutely don't expect anybody to remember the numerous writings in any [108] kind of detail. I certainly wouldn't.

Q Right. And you –

A But we were able to discuss his ability to convey information, detailed information, to his attorney.

Q Yes. In your reports you state, quote: "He expressed a reasonable method of communicating with her," unquote. What did you mean by that?

A Yeah. I was referring to a much more rudimentary issue. He gave me – he provided me a manner by which he could contact his attorney. That's it.

In other words, something like an address, something like a phone number, or even a – you know, somebody to go through, through his family, things of that nature.

Q Did you get the impression at any point that he was withholding any information from his attorney?

A I only caught a piece of your question. Could you repeat it?

Q Yes. During your assessment of him were you ever left with the impression that he was withholding any facts that he should turn over to his attorney?

A I'm not sure I can answer that. I think he was trying to present himself in a favorable light to me. So, you know, that that's reflected by the two tests that I gave him. That he was essentially trying to put his best foot forward with me. But, you know, he was able to provide me a substantial amount of [109] information and he indicated that he – a willingness and a history of having provided detailed information about his alleged offense to his attorney.

Q Did he indicate anything about whether he was getting along with his attorney?

A Yes. Yes, he did. First of all, I should say that as of my evaluation, prior to my evaluation. So I don't know about his relationship after the fact. He told me he had met with his attorney, he was able to identify that she was court appointed, who she was, the nature of the charges, that kind of stuff. He told me

he had met with her several times. He told me he expressed some reservation about her. He said a couple of things; he was really undecided, what he thought about her. But he was willing to try to work with her. He said that she's sometimes there, she's sometimes not there, that she – please understand I'm just telling you what the defendant relayed to me – that she brought up issues of her mental illness, things of that nature. She also discussed po – you know, he felt he was unclear if he could trust her, but he was willing to work with her. He told me that they also discussed possible sentencing ramifications with a finding of guilt. He told me possible defenses that they considered, such as NGRI, not guilty by reason of insanity. He told me that it was his attorney's idea for this – for these, I guess I should say – these series of evaluations because she felt that his emails [110] contradicted themselves. So, you know, a number of things along those lines.

Q Isn't it true that the inmates who are evaluated at your facility are often maybe at some degree suspicious or uncertain about their attorney?

A Absolutely true. And I have to add, especially public defenders. This is not something that I think is sound or valid in any way. But yeah, they do express that, that attitude, often.

Q And I believe that you testified earlier that he was on some medication when he first arrived at your facility but then voluntarily was removed from that; is that true?

A Yeah. I can't give you the exact date when he discontinued it. I don't think – if I did get it from him, I don't recall it now. However, I do know he saw the psychiatrist on the 12th, March 12th of 2004, and at that point he told the psychiatrist he had been taking it sporadically at best and he had discontinued it on his own. And in fact he did tell me the same thing. And it was – the medication was Paxil, what most people consider an antidepressant.

Q And just suspend your own view of this case for one moment and assume that Dr. Bennett is correct that the defendant suffers from a delusional disorder persecutory type. Is there any medicine available that could mitigate the symptoms of that, of that psychosis, in the event that's what he had?

[111] A Yes. Most definitely. In fact PSM even talks about it. But there's – there's a whole host of other much more scientific research. The antipsychotics, what people consider the antipsychotic medications. And there's probably 50 of them or more in this country that are FDA approved, and they would work on such symptoms, and particularly well on such symptoms like what we consider delusions or hallucinations, these thinking and perceptual disturbances. And there's even a whole host of newer medications called the atypical antipsychotics which actually work on, to varying extent, on the more resilient symptoms of psychotic disorders, which this individual has not displayed or there is no record that he has displayed those, typically referred to as negative symptoms.

Q And I'll ask you this last –

A So yes, the short answer is –

Q I'll ask you this last question –

A I'm sorry. I didn't hear you.

Q I'm sorry. Can you hear me? Can you hear me now?

A You're coming in and out. Go ahead.

Q Okay.

A Yeah, yeah.

Q We made it this far. Is it your professional opinion that the defendant is competent to stand trial to the extent that he can assist in his own defense?

A I should add the caveat that up until the time I saw him, I [112] do – it is my opinion that he is competent to stand trial. Please understand that it's been approximately three months since I've seen him. And other than a glimpse at his testimony today, you know, I don't have a very comprehensive opinion of his current level of trial competency.

Q Is there anything that you would have observed – that you observed in observing his testimony today that would change your opinion?

A No. I have to tell you he was pretty consistent with the behavior I saw three months prior.

MR. BUTLER: Nothing further. Thank you.

CROSS EXAMINATION

BY MS. HILLMAN:

Q Dr. Buigas, can you hear me?

A Yes. Yes.

Q Okay. I want to refer you to a document that you provided to Dr. Bennett called the Competency Commitment Interpretive Report.

A You're talking about the MMPI; right?

Q Right. Do you have that available with you?

A Yes, I do. Yes, I do. I'm sorry. I seem to miss the first few words of every question. So yes, I do have it available.

Q What I want to ask you about this report is: This is in fact a report that is generated by a computer program; is that [113] correct?

A That is correct. In fact, this – these are specialty norms just for this exact population. In fact, a lot of people inappropriately use general interpretations on the MMPI. This, this entire population is undergoing a forensic evaluation. So yes.

Q And is it correct that this computer program interprets – it's basically done by, put together by, the authors of the MMPI and it interprets automatically the test results?

A It does. It's put together by the authors and it incorporates research findings. However, it should

say it is absolutely a hypothesis generation. For example, any report will give you, you know, a number of different hypotheses, assuming it's valid and assuming its not valid. But yes.

Q And there is in fact a – there is in fact a section of this report that is generated that is listed on page three, entitled Profile Validity; is that correct?

A Yes. I'm sorry. Did you ask a question?

Q Did you hear my question, did you hear the question?

A No, I didn't.

Q Okay. The question is on page –

A About validity?

Q On page three of the report there is a section entitled Profile Validity; is that correct?

A Yes. I'm sorry. I thought you asked another question. [114] Yes, I did hear that, and yes, that is true.

Q And that three paragraphs describes the validity of the MMPI testing in Mr. Irizarry's situation, does it not?

A Yes.

Q And nowhere in that assessment does it state that this profile is invalid?

A Actually if you look at question – I'm sorry. Statement – the third sentence on the first paragraph, it says: "The resulting MMPI-2 profile is unlikely to provide much useful information about the client because he was too guarded to cooperate in the self-appraisal." That's directly impacting the validity of the results.

Q But it does not say it is invalid, does it, Doctor? It says it should be used cautiously and that the – I believe if I can find the exact wording, it says it is unlikely to provide much useful information, it says that it – the client consciously made efforts to influence the outcome, and it says that the test interpretation should proceed with caution; is that correct? I'm referring to paragraphs one and two.

A Well, yeah, I'll tell you that is correct. But I'll tell you that doesn't negate the first paragraph, the prominent paragraph. And I do know a lot about this instrument; I'll tell you that it will never use the word "invalid" in the fake good direction. It will only say it in the fake bad direction. So that means there's several ways you can detect [115] whether somebody was faking good, in other words, trying to present themselves as better off than they are. And –

Q Dr. Buigas?

A – the –

Q Dr. Buigas?

A Yes?

Q If I can interrupt you?

A Yes.

Q In the third line of the first paragraph, it states that the validity is weakened, but it does not state that it is invalid?

A Yes.

Q Okay. So would you agree that –

A As I explained, based on the fake good indices, it will never say that.

Q So in other words, the authors that developed the computer program designed it to never say that a result could be invalid to the good side, only invalid as to the malingering side?

A That's correct.

Q And do you know of any reason why the authors of the MMPI would do that?

A No, I don't. I don't. But I can tell you that the research is really, really clear on this. Even both general and forensic populations, the cutoff for L is – it's a very hard ceiling, and that is 70, a T-score of 70.

[116] Q Now, Dr. Buigas, you indicated that the MMPI that you gave – Dr. Buigas, the MMPI you gave, the MMPI that Dr. Bennett gave, and the other personality tests you gave, it was the PAI or the PIA, whatever that test was, they all basically gave the same results? Is that correct?

A Yes. The same test-taking validity results, yes.

Q So you've got an MMPI taken in – several months before your MMPI, and then a PIA administered a month or month and a half after the second MMPI, and all three of those tests are invalid?

A Yes; that's correct.

Q So based upon your opinion, Mr. Irizarry was trying to present himself more positively on all three of these tests, to achieve identical results in all three?

A It's funny. The L-scale is very different from a defensiveness index. The L-scale, as I explained, is an unsophisticated approach. This is not – essentially this is saying that the person's unwilling to admit to common human frailties and is trying to give a picture of unrealistic moral virtue. And yes, all three are invalid for the same reason, although obviously the PIA is a different scale.

Q So in all three testings, the two MMPIs and the PIA, in all three situations Richard Irizarry was attempting to present himself, in other words, with less mental problems than he has? Would that be fair to say?

[117] A No. That's not what the L-scale – no, no, absolutely not. The K and S scales on the MMPI and other indices would indicate that. The L-scale is exactly what I said: It is attempting to paint a picture of unrealistic moral virtue.

Q Okay. But didn't you say in your report that Mr. Irizarry was trying to minimize his – I'm sorry. I'm trying to find exactly what I want to refer to.

A I'm sorry. I didn't hear that.

Q I'm sorry. I'm still working on the question. Bear with me.

A All right.

Q I'm sorry. I'll withdraw the question.

Dr. Buigas, what efforts did you take to verify the information Richard Irizarry related to you?

A I think I had – you know, I actually spoke to – well, I got information from both attorneys. I don't think I spoke to you. I think I left you a message. And please correct me if I'm wrong, but I believe you only got back to me after – at the conclusion, after I had already sent the report out. But you did provide me with some information, so I got some collateral sources, collateral sources of information from both attorneys. I also – this is very much collateral information; and that is, I consulted with the unit staff on his current behavior, current meaning at the time of the evaluation, from a variety of sources, to see him 24 hours a day for a period of [118] approximately – let's say a month and a half, even though he was at the institution for two months or so.

Q But other –

A So those are my corroboratory information.

Q Now, I did send you a copy of Dr. Bennett's evaluation?

A Yes. I said we did not speak.

Q Right.

A If I remember correctly.

Q Correct.

A You did provide me with collateral information, yes.

Q Okay. But you and I did not discuss, for example, my relationship with Mr. Irizarry or how he was behaving during our meetings?

A I believe we did not. Please – I did not note that anywhere, so please correct me if I'm wrong.

Q That's my recollection as well. That is my recollection as well.

A Okay.

Q Okay. But you did not attempt to verify any of his belief systems regarding the abuse of his children, his wife's involvement with the Klan, the contact he had with his ex-wife, Jim and Susie Oswalt, Kim Mertz – you didn't attempt to verify any of that information; is that right?

A No. That is correct. Other than, you know, what was in the numerous writings, I did not attempt to verify that [119] information and – you know, by talking to family members directly. That is correct.

Q Did you review any other part of the discovery other than the emails? Did you review any part of the discovery other than the email communications written by Mr. Irizarry?

A I'm going to say yes. I think there was some law enforcement reports and, you know, I think interviews. And I have it all with me. So if you want, I can look through it now. And, you know, some things like indictments, prosecution memo. I think there might have been – even been a memo either from you or discussing something about you and your relationship with him. And I think that was the extent of my discovery information. It was actually several inches thick, as you can probably see here in the file. This is the entire file, and it's mostly discovery information (indicating).

Q You have much less than I do.

A I'm sorry?

Q Were you provided by the government with the reports of interview of Leah Smith, Kim Mertz, or any of the court documentation from South Carolina?

A I have to confess it's been a few months since I've reviewed the collateral information other than what was recently sent to me, I believe by you, or by the AUSA through you. If you want, if you bear with me, I can go look through it and see what I have.

[120] Q What's important to me, Dr. Buigas, is whether any of those documents were referenced by

you in your diagnosis process in verifying any of the information Richard Irizarry gave you.

A Let me see if this answers the question. I reviewed all the documents and they all went into my opinion. However, I did not list them individually. In fact, if you look very early on in my page – in my report, I'm sorry – page two, under the evaluation procedures I just – it was so much information, that I just said "discovery documents." That's it. So yes, it all went into my – everything I had went into my opinion.

Q And did you find, in reviewing the documents – did you find, in reviewing the documents, and in assessing Mr. Irizarry's version of events, his history that he was relating, his accuracy, did you consider information contained in the discovery that directly contradicted his version of events? And if so, could you point that out for us?

A Yes, I considered it. I have to tell you the defendant, both in his writings and with me and I'm sure with anybody else, there is a degree of inconsistency to his presentation. I think it's probably multi-reasoned. I think some of it, it's so numerous and detailed that anybody would be confused. I think the defendant gets confused easily. I truly do believe that. I think he constantly –

Q Doctor? Doctor? Doctor, I'm trying to kind of keep you [121] on – not to get off on a tangent here, but to keep you focused on one point, which is this:

You testified that a delusion is a fixed false belief; is that right?

A Did I use the word "fixed" – irrational maybe?

Q Yes, "irrational belief."

A In the face of contradictory evidence?

Q Exactly. So in other words, if the defendant has a fixed irrational belief in the face of contradictory evidence, would it be fair to say that he is delusional?

A If he had an irrational belief in the face of contradictory evidence, I would agree with that.

Q So did you check?

A I would agree that it certainly could be.

Q So did you check, in the course of your evaluation of the defendant, in the discovery provided by the government, to determine if there was contradictory evidence of any of his beliefs, such as that his children were being abused, that his children's toenails had been ripped out with pliers, that his daughter had been hit in the head with a hammer, that his ex-wife had hacked into the KKK computer system, that she was a member of the Klan, that her boyfriend was a member of the Klan – did you attempt to verify whether any of these attempts were true? I mean were verifiable? They're obviously true to him.

A Well, I guess I would ask how they were verifiable. By asking somebody if they were a member

of the KKK or if somebody [122] was beating their children? I would say that I don't think information like that can be verified in most cases. And I did have – again, I did refer back to the discovery documents, the case interviews and stuff like that. There were inconsistencies. But you need to understand that I absolutely believe that the defendant is paranoid. I absolutely believe he misreads cues, statements, events. I think that's prominent with this individual.

Q Let me ask you another question, Doctor. In terms of determining whether a person has a nonbizarre delusion, would it impact your opinion if there were numerous witnesses who contradicted the defendant's belief system? Would that tend to indicate more of a delusion or less of a delusion? I mean obviously, unless you're there, you can't know for sure. But disinterested third-parties versus family members? Does quantity necessarily matter?

A I didn't . . . (inaudible).

Q Did you hear that last part?

A I'm sorry. I did not. No, I did not.

Q For example, in assessing whether someone has a nonbizarre delusional belief system, would it matter to you how many people contradicted him and the fact that they would be on both sides of the issue? Would that make a difference to you? For example, if not only his ex-wife contradicted him, but also his family members contradicted him?

[123] A Right. Well, I take your question to be asking me if there was contradictory witnesses –

Q No.

A – would that essentially go toward the issue of delusion or not, whether it's bizarre versus nonbizarre?

I think in most cases that absolutely would be important. But again, there's also the issue of the paranoia ingrained and pervasive in this individual. And I think, regardless of different, more – let's say valid accounts, he's going to misread things and he's going to misinterpret things. And I think that's not going anywhere, that's very pervasive with this individual.

Q Isn't there a difference, though, Doctor –

A And it's always very . . . (inaudible).

Q Isn't there a difference, isn't there a difference, though, Doctor, between misreading something and misinterpreting something and believing in something that isn't there, something that doesn't exist? That is a difference, isn't there?

A I think you'd have to take that on an individual fact issue. For example, if – let's say infidelity. That's a good issue with this case. The person believes that the significant other is unfaithful, and yet you know you have three witnesses saying "no, I was faithful," I'm not really sure if that's contradictory evidence or not. I would say it's not [124] necessarily.

Q Let's say, for example, things that you can verify, such as whether the defendant saw his children, whether the defendant had a hotel room with Leah Smith, whether Leah Smith called him during the periods they were separated. Wouldn't it indicate a delusion more than a misinterpretation, if evidence – if source upon source upon source indicated that the defendant's perception was not merely untrue, but was nonexistent? Wouldn't it make you believe he was delusional if it wasn't just one fact pattern in which there was contradictory evidence, but it was in every fact?

A Well, again, we've got a distinction here; and that is, I think that his, let's say, style of perceiving his environment is going to be stable and pervasive, meaning it's not going to coincide with other people. And again, just to be – express my own cynicism, I'm not sure if the alleged victim in this case and close friends and even – even a family member of the defendant are necessarily contradictory. You know, if they are saying something else, or necessarily contradictory evidence that I would take at face value, it certainly could be the case and certainly not be the case.

Q But you don't have any specific instances of evidence that you were provided by the government that you can point to to say this was merely a misinterpretation or this is not a delusion regarding the topics that we've discussed? You didn't [125] highlight any of them in your report, did you?

A I reviewed all the documentation that was provided to me with the exception of the packet that was sent very recently. I have reviewed it. It obviously did not go into the report.

Q Was that – I'm sorry to interrupt you, Doctor.

A And –

Q That last packet, was that the packet that was received by the –

A Yes.

Q – received from the attorney in South Carolina, Donna Chapman? Was that the packet you're referring to?

A Let me – let me check.

It is a packet – yes, Donna Jackson. And I received it just very recently, probably within the last week or so.

Q And you did not review that in preparing your report?

A Absolutely not. Unless there's any – I should say unless there's any overlap between the stuff, information previously provided to me. I don't believe there was, but I absolutely did not review that packet for the report.

Q Okay. Now, you gave him a test. I believe you called it the Georgia something or another test on courtroom competency? Whatever that was called.

A Yes.

Q What specific questions are on that test that ask about his ability to assist his attorney, and could you give us some [126] examples of those?

A Sure.

Q Just two or three.

A I should say they all . . . (inaudible).

Q Two or three examples.

A Sure, sure. So to summarize, your question was anything that specifically talks about his ability to work with his attorney?

Q Yes.

A Okay. First of all, he was able to adequately give me an explanation of his – the role of his defense attorney. He indicated a – reasonable means of contact [sic] his attorney, and in this case you. He gave me a strategy of how he can help defend his attorney – or tell the circumstances and facts, let the actions – "help explain the actions that I took." Those are answers to specific questions in the GCT. In addition to that, him and I elaborated on some of those answers. So some of those questions that are directly from the GCT are: "How can you help your lawyer defend you?" and things like that.

Q So those questions on that test are more designed – except for the last one, explaining his

actions and providing facts – my role, his ability to contact me, that deals more with his understanding of the process, doesn't it? We've got two prongs to competency: "Understanding what everybody does and then assisting in your defense"?

[127] A I'm sorry. I only caught the first part of your question. So let me answer that and then you can ask the other part. I would definitely say that knowing the role of his attorney would go towards a factual understanding of the legal process, and I think his ability to strategize on how he can assist in his own defense would go towards the second prong of the legal criteria.

Now, I should say that, you know, again, we elaborated on many of those questions and we talked about really specific strategies and really specific information that he gave, and his willingness to work with his attorney.

Q Let me ask you this question, Dr. Buigas: Assuming for a moment that Mr. Irizarry is an inaccurate historian – in other words, the facts that he relates are not accurate – and he believes they are accurate, would that impair his ability to assist in his defense? It would, wouldn't it?

A You know, it's funny. I would say it's – maybe.

Q And would it also impair his ability to assist in his defense if he became, as a result of either your diagnostic criteria or Dr. Bennett's diagnostic criteria, incredibly suspicious of his attorney when his

attorney was unable to find evidence to support his factual assertions?

A You're saying because he is suspicious or not trusting his attorney, he's delusional?

Q No, no.

[128] A I would say that that's not an automatic assumption at all.

Q Doctor, that's not what I'm saying at all. I'm saying if the information he's relating is not verifiable and if his attorney then says to him: "I cannot verify what you're telling me," do the criteria that you found, that he was overly suspicious and that he was paranoid, wouldn't that affect his ability to assist his attorney?

A It certainly could. But he could also, with a good understanding of the job of the attorney, he would say: "Okay. You may not have done the best you could have done for me, but I understand that this is your role and I'm willing to work with you regardless." So, you know, it could and it could not.

Q I want to make sure I understood. I want to make sure I understood your last answer. I want to make sure I understand that.

If a client does not believe his attorney is doing a good job for him because they cannot find particular pieces of evidence, it is your opinion that they can still assist a poorly performing attorney in their defense?

A I tell you, I guess I interpreted your question as not doing an optimal job for the client. And I think that's what's going on here versus an – again, this is my impression of what's the defendant's impression, not my opinion. But I think that's what the defendant was believing. And I think he [129] absolutely could continue to assist in his own defense competently.

Q So I want to make sure I understand, I want to make sure I understand. Your assessment is that the defendant was relating to you that my performance was not optimal in large part because I could not find evidence he believed existed which was material to his defense.

A No. That's not the only reason why he had that impression.

Q Was that one reason?

A He had that impression because –

Q Was that one reason why he had that impression? Was that one of the reasons why he had that impression?

A You know – you know, I would say only indirectly. It seemed like he was not – not fully satisfied with the effort level, not – but again, he didn't – he did essentially indicate a willingness to work and a trust for you, for his attorney.

Q Is the – in your assessment of ability to assist, is his accuracy as a historian, his ability to – let me back that up.

If he believes something is true and I can't find information to verify that, is that going to negatively impact his relationship with his attorney, due to his paranoia?

A I think – it's funny. You know, because something can't [130] be found doesn't mean it did or did not occur. However, I would say that he's going to be a difficult client because of his personality. He's going to be a very difficult client. However, I think he is able to assist in his own defense, especially if motivated to do so.

Q And in your opinion, Doctor, what can motivate him to do so?

A You know, there is no easy answer to what can motivate a human being to do something. You know, I can give you three or four wild reasons. But, you know, it's really tough to quantify.

Q The only other question I'd like to ask you, Doctor, is how much did you yourself, not counting your assistants, not counting other staff members, how many hours did you yourself spend in conversation, not in testing but in conversation, with Mr. Irizarry?

A Boy, I can tell you how many hours I spent with him. I do not break down a minute-by-minute cap and summary of how much is spent testing and how much is spent talking. You know, the testing is talking. And even if I could, that's not the basis of my opinion. My basis of my opinion is on the collective

information. But I can tell you how many hours I spent with him. Not – I can't break down the testing versus talking.

Q Okay. Testing and talking, how much?

A 3/11, 1.5 hours me exclusive. 3/19 was just a student, so [131] I'm not counting that. 4/9, 1.75 hours me and the student. And 4/12, 2.5 hours solely me. So that's approximately –

Q And that includes testing and conversation?

A That's approximately six hours. But that is not the basis of my opinion, the sole basis of my opinion.

Q Would you – would it be safe to say that in your assessment Richard Irizarry attempted at all times during his contact with you to put his best foot forward?

A At all times? No. I think there was a sort of underlying current to just slightly twist – I mean, he did reveal information that made him look, you know, portrayed him in a negative manner. But he always tried to put a little bit of a positive spin.

I'm going to give you one really, really minor example of it. He told me about this incident, the one that was in – when they ran NCIC – that was revealed in his arrest or charge for animal cruelty. Well, you know, he really minimized that. He said he just threw a cat – I don't know – onto furniture or something like that. However, he also indicated the cat

required a leg amputation. And, you know, it's most likely that he did a little bit more to a cat to require amputation of a leg. So he tended to minimize his actions overall, but it wasn't every single contact, and it certainly did not prohibit him from revealing damaging information. I would say overall he was pretty honest with me.

[132] Q Doctor, let me propose something to you about, for example, the fact you just related about the cat. It is your opinion that Mr. Irizarry, if he – if the cat's leg had to be amputated, Mr. Irizarry's version of events was a minimization of his conduct; is that right?

A Yes.

Q And isn't that a fact that can either be verified or not verified?

A I mean, in an absolute sense, if you contacted every veterinarian that ever existed, I suppose theoretically it could be verified.

Q Let me give you – hang on. I'm trying – let me give you a simpler example. Let's assume hypothetically Mr. Irizarry reported that he reported to Child Protective Services in a particular state that his wife had abused the children and in fact Child Protective Services indicates no such complaint was ever filed, would you consider that to be a verified or an unverified fact?

A Most likely verified.

MS. HILLMAN: Thank you, Doctor. I have nothing further.

Oh, and, Your Honor, I would like to offer the report I referred to as Defendant's Exhibit 5.

MR. BUTLER: No objection.

(Defendant's Exhibit 5 was entered into evidence.)

[133] REDIRECT EXAMINATION

BY MR. BUTLER:

Q Dr. Buigas, you were asked a number of questions by Ms. Hillman about what seemed to be a semantical debate about the word "validity" with respect to the MMPI. Do you remember that?

A I'm sorry, Mr. Butler. I really didn't catch the end of your question.

Q You were asked a number of questions by Ms. Hillman about whether the MMPI results with regard to the test administered to the defendant by you and by Dr. Bennett were valid or not. There was some focus on that word "valid." Do you recall that?

A Yes. Yes, I do.

Q But putting the issue of the word "validity" aside for a minute, in any event, those results were unreliable; is that right?

A Yes.

Q And would you also agree that you were charged in this case with determining whether the defendant has the ability, the present ability, to assist in his own defense and it's not whether he chooses to do it, it's whether he has the ability; is that correct?

A That's correct.

Q And isn't it also true that the two prongs of the competency issue – number one, whether he's competent to the [134] extent that he understands the nature and consequences of the proceedings against him on the one hand, and on the other hand whether he's competent to assist in his own defense – those are not mutually exclusive propositions, are they?

A Absolutely not.

Q And you witnessed the defendant's testimony today; is that right?

A Yes.

Q And did he appear motivated today to assist in his own defense, in your estimation?

A I believe so.

MR. BUTLER: Nothing further, Your Honor. Thank you.

THE COURT: Thank you, Doctor. Your testimony is concluded at this time.

THE WITNESS: Okay. May I leave?

THE COURT: Any objection?

MS. HILLMAN: No, Your Honor.

THE COURT: You may.

THE WITNESS: Okay. Thank you.

THE COURT: We're going to be in recess until tomorrow morning.

MS. HILLMAN: What time, Your Honor?

THE COURT: 9 o'clock.

MS. HILLMAN: Thank you.

MR. BUTLER: I apologize for not finishing.

[135] MS. HILLMAN: As do I.

THE COURT: We will meet tomorrow – we don't have any further need for the television, the teleconferencing –

MS. HILLMAN: No, Your Honor.

THE COURT: – so we'll be in my courtroom tomorrow.

MR. BUTLER: Great.

MS. HILLMAN: Yes, Your Honor.

(This hearing adjourned at approximately 4:52 p.m.)

[136] (July 21, 2004, courtroom 2B, 9 a.m., in open court, defendant present.)

THE COURT: All right. Good morning.

MR. BUTLER: Good morning.

MR. WILLIAMS: Good morning.

THE COURT: Are the parties ready to proceed?

MS. HILLMAN: We are.

THE COURT: All right. Ms. Hillman?

MS. HILLMAN: Your Honor, the defense would call Dr. Thomas Bennett.

THE COURT: All right.

THOMAS S. BENNETT, Ph.D.,

was sworn and testified as follows:

THE WITNESS: Yes.

THE CLERK: Please be seated.

DIRECT EXAMINATION

BY MS. HILLMAN:

Q Would you state your name for the record, please?

A Thomas S. Bennett.

Q And how are you employed, Dr. Bennett?

A Clinical psychologist in private practice.

Q Okay. Did I ask you to interview and assess Richard Irizarry?

A Yes.

Q What are the terms of your engagement with us?

[137] A I'm sorry?

Q What were – how are we going to pay you?

A I assume I'm going to submit an invoice to you and then you'll write a check.

Q Is there an hourly rate set or a flat rate set?

A I use an hour rate.

Q What is that hourly rate?

A $125 an hour.

Q Is that pretty much your standard rate?

A Yes.

Q Dr. Bennett, if you could, just start at the beginning. When I contacted you about Richard Irizarry, what did you do?

A I initially left an MMPI-2 for him to complete until I had a chance to get down there to see him, and then I went back and interviewed him and did some more testing with him.

Q Okay. What other tests did you perform besides the MMPI-2?

A I did a quick and simple screening on intellect; I did the Wechsler Abbreviated Scale of Intelligence. Typically I would give more a detailed intellectual evaluation, but it seemed that he was almost certainly of average intellect, and I didn't think there was any other issue that was relevant to this that would require doing a more detailed evaluation. I picked up the MMPI-2 and I also did a Rorschach and had him do some house-tree-person drawings.

Q And you heard the testimony of Mr. Buigas yesterday. Was [138] there any test that you gave other than the MMPI which indicated any different findings than the tests that he gave?

A No.

Q Okay. So basically the difference between your conclusion and his, does it center on the MMPI or is it based on other things?

A Well, it's based on an overall impression. And, of course, the projective instruments I gave him are not nearly as well validated, they are very difficult to validate. But with my years of experience using them, I still develop some hypothesize out of that. In this instance the MMPI pretty much validated all of those hypotheses as well. So it's a nice objective check.

Q Okay. To what extent did you and I discuss Mr. Irizarry's situation?

A Talked on the phone a couple of times, had a meeting last week, and then here at the courthouse I

guess we probably talked an hour and a half or so then.

Q Okay. And have you reviewed discovery provided by the government?

A Yes.

Q What have you specifically reviewed – or just generally reviewed, I guess is a better question?

A I've reviewed the emails that Mr. Irizarry sent, the report from the Federal Correctional Center in Miami, and the MMPI [139] interpretation that was generated at the Federal Correctional Facility through the National Computer Services' MMPI service.

Q And in addition to the emails that I also provided you with, some handwritten letters?

A Yes.

Q Okay. And those were – were supplemental discovery that I had received from Mr. Butler?

A Yes.

Q Now, in assessing Mr. Irizarry, what diagnosis did you reach?

A I diagnosed him as having delusional disorder.

Q And could you describe for us what delusional disorder is?

A It's characterized by a set of false or irrational beliefs that are perpetuated for at least a period of one month to the point where they interfere with the individual's ability to function adequately in a variety of common roles in life.

Q Okay. And how different is your diagnosis from Dr. Buigas' diagnosis?

A Quite a bit.

Q What are the things you saw in Mr. Irizarry that led you to believe that delusional disorder was the appropriate diagnosis?

A Actually I had rendered that diagnosis before I saw the emails. So I'll talk about it absent the emails. His account of the events that had occurred over the approximately past four years were scattered. There were bits and pieces of [140] things that made sense, but it didn't tie together in a coherent pattern. There were some inconsistencies in his story. I thought that his account of some of the things that happened was, frankly, quite farfetched. I simply did not believe that they were true. But he certainly had an intense belief that they were true. And when his belief is consistent over the long haul and is not consistent with what's likely to be the truth, then that's what we call a delusion.

Q And did you find support for that in the emails when you reviewed them?

A Yes.

Q In what way did you find support for that?

A Well, the emails state, of course, what we heard yesterday about the hacking into the KKK computer. He referred to people following him. He expected to go out in a blaze of glory and to be all over the California newspapers. He mentioned several states, and I think Canada also, that he was in the process of traveling to; that he was communicating with two governors. He was traveling to Florida with four of the craziest people you will ever meet; ex-guerilla warfare soldiers. He planned to make a federal case; he had been told by a district attorney in California that he could make a federal case out of the things that his wife had done related to the divorce and custody of the children. He was going to get other people on his side that could perform such acts as bringing to life a towering [141] inferno. The police were conspiring against him, taking evidence that he needed. Frankly, I did not believe that many of those things were true.

Q And in the course of your evaluation of Mr. Irizarry, you did evaluate the MMPI test results?

A Yes.

Q And what did your interpretation of the MMPI show?

A I prepared a report in February that was an overall report. ,

Q Let me interrupt you there for just a minute. Is this the report you're referring to?

A Yes.

Q Okay. And a copy of that's been filed with the Court?

A Right.

Q So go ahead.

A Basically it was consistent with what I would call a fixed delusional system; that is, a set of delusions that has solidified, that is rigid, very difficult to break, very difficult to give contradictory information about and that's occurred again over a period of time.

He did show signs of some depression as well. He was obviously alienated from other people, had a great deal of difficulty in relationships in general, strong chronic feelings of inferiority. Those are the main highpoints.

Q And did you review this document that I believe was introduced yesterday as Defendant's Exhibit Number 5, the [142] report that was generated by the computer program in Dr. Buigas' office?

A Yes, I did.

Q And specifically I'd like to direct your attention to the Profile Validity section of that report. In your professional opinion, does this part of the report indicate that the MMPI results were invalid.

A Not at all.

Q And explain to us why they are not invalid.

A Attempts to distort the results is not the same as rendering them invalid.

Q And how is that different?

A When we look at the validity scales, they tell us how those results on the other scales were distorted. In Mr. Irizarry's case he made an attempt to distort the results in the direction of looking to be much more psychologically healthy than was actually the case.

Unfortunately, his effort was not particularly believable. One of the reasons that it's not is he still had a great many clinical scores that were extremely high. In other words, he scored in the upper two percent on the number of items that he answered positively on the Paranoia Scale despite attempting to look psychologically healthy. In other words, he attempted to look psychologically healthy but simply could not pull it off anyway.

[143] Q When they're talking about the Paranoia Scale, is that indicated on this chart?

A It's the sixth point on there.

Q Okay. This is page eight of the report generated by the computer program provided by Dr. Buigas?

A Right.

Q And the Paranoia Scale –

A That's it.

Q – is this dot right here?

A Right.

Q Okay. And when you say that it's unusually high, could you explain that?

A Well, if you look at the 50 along the left-hand side there, that's average, that's a T-score of 50. A score above 80 is two standard deviations away from the mean, which means it's fairly less than two percent of the population.

Q Okay. So even though where it indicated that Mr. Irizarry was trying to appear more favorable than he was, he still scored very high?

A Yes.

Q I'd also like to direct you to the next page, which is page nine. And this, first, is this the Anxiety Scale?

A Yes.

Q Why is this score significant in terms of Dr. Buigas' diagnosis?

[144] A Well, I don't question that Mr. Irizarry had some anxiety. But that certainly is not the most prominent feature of any of these profiles. There's also some items scored on the profile sheet that you had before, the 7 scale, or Pt scale. But he had about six scores, I think. For instance, that seventh score, the one that says Pt –

Q This one?

A – is actually in the average range.

Q And what does Pt stand for?

A Psychasthenia. It's an old term for anxiety.

Q Okay.

A But as you can see, he's got seven clinical scores higher than that.

Q Okay.

A In other words, that was not a prominent feature of this configuration at all. The scores related to depression, emotional overreactivity, to alienation, and to other problems.

Q Now, depression is D?

A No – the depression is the second one; right; D.

Q And what were the other ones?

A The third one is called hysteria, but it's basically emotional overreaction.

Q Okay. And this one here, the Pa?

A Right. That's paranoia.

Q Paranoia? And this one here Sc?

[145] A That's schizophrenia.

Q And what does that entail?

A Two things really. It can indicate some thought disturbances like delusions and hallucinations. It also indicates significant alienation from self and others.

Q This scale here, Ma?

A Mania. That is hyperactivity, flight of ideas, agitation, irritability.

Q Okay. And this, is this here included in this? This is the scale we're looking at on the sideline?

A Right.

Q Now, who wrote the computer program that Dr. Buigas used to generate his report?

A This particular one that they used was written by Jim Butcher.

Q And who is he?

A He's the best-known expert on forensic use of the MMPI in the world.

Q Okay. And so the computer program that he helped develop, or that he developed, does it give basically what his opinion would be of the validity scores or what the scores should represent?

A His opinion based on the years of research and statistical analysis of the profiles over the years.

Q And again, this computer program did not say the report was [146] invalid?

A Not at all.

Q Okay. Now, did you, after listening to Dr. Buigas' testimony yesterday, provide us this morning with some additional research regarding Profile Validity?

A Yes.

Q Now, basically could you summarize – where did that come from, first off?

A It came from this book by John Graham, the MMPI-2: Assessing Personality and Psychopathology, I believe that its the most widely used text and reference on the MMPI-2 in the world. Its generally referred to by psychologists as either Graham or the Graham book because its so well known and widely used.

Q Okay. And what does the book state about Profile Validity?

A Do you want me to read from the –

Q Well, you can summarize it, if you would like.

A It basically says that distorted MMPI profiles are not uninterpretable, that a more sophisticated approach to interpreting them would be to take the validity scales and integrate that into your interpretation of the clinical scales, knowing that the person made an attempt to distort the results.

Q And basically when we look at page two of that report, much was made yesterday of the L-scale. Is that the L-scale?

A Yes.

[147] Q And this is the scale that indicates whether or not Mr. Irizarry was telling the truth when he answered the questions?

A Well, it's one of them. It's called the Lie Scale because the questions on it, the statements on it, are so clear-cut that in many instances people tend to not respond to them and there are things that ordinary people would generally respond "true" to and that people who are attempting to distort results, making themselves look healthier, will sometimes report more "false" on those items.

Q Okay. So the fact that his score is here on the L-scale, is that unusually high?

A In some situations it's not. It is somewhat unusually high in a population such as Mr. Irizarry would be in because many people in that population would want to make themselves more disturbed. Many people that I see want to make themselves look very healthy. I do a lot of screenings for things like having surgery for morphine pumps, and those people want to look psychologically healthy so that they can get those procedures done. You can also see high L-scores in those people. But most of the criminal population is really more oriented toward making

themselves look as though they aren't functioning quite as well.

Q In other words, most criminals want to look crazy; is that a simple way –

[148] A In some circumstances. I've certainly seen lots of that.

Q Now, Dr. Buigas diagnosed Mr. Irizarry with a paranoid problem and an anxiety disorder. How is your diagnosis different from that diagnosis?

A The paranoid personality disorder, as Dr. Buigas testified, is a longstanding problem in how people relate to the world in general. It's characterized by suspiciousness, hypersensitivity mainly. However, it is absent true delusions. It's not unusual for an individual to have an underlying paranoid personality structure. But in stressful situations where they decompensate, then that suspiciousness is elevated to the level of a delusion as they put together bits and pieces of innocuous information and form it into a pattern that has a more sinister meaning.

Q Okay. And in your diagnosis you also mentioned that the delusion that Mr. Irizarry suffered from is nonbizarre. Can you explain to us the difference between a bizarre delusion and a nonbizarre delusion?

A Well, a bizarre delusion, as far as we know, simply can't happen: Aliens have come down and put tadpoles in your mouth and you swallowed them and maybe then frogs are jumping around in your

stomach. The nonbizarre delusion, it sometimes has a kernel of truth somewhere in it or it's something that could in real life happen with a very limited percentage of probability.

Q So, for example, "my wife hacked into the KKK computer," [149] "my kids are being abused," those sorts of things would be nonbizarre delusions that there was no support for them in fact?

A Right.

Q In your report that has been filed with the Court you indicated that Mr. Irizarry may have trouble assisting in his defense. What is the things about your diagnosis that indicates Mr. Irizarry might have trouble in that area?

A At that point when I saw him in February, I believed that he would have difficulty relating accurate information to his attorney, which of course is one of the most important things in assisting in his defense. I was afraid that he would throw in many red herrings that are actually parts of his delusions, things that would send his attorney off in a false direction or give information that would be more consistent with his delusional system than with the truth and the delusional system itself would not be helpful in his – in any sort of defense for him.

Q So it wasn't that he didn't understand the role of his attorney?

A That's correct.

Q And he understood what his relationship with his attorney was in terms of him being the client and the attorney being the attorney?

A Yes. And intellectually he certainly understands the [150] importance of telling the truth to his testimony, as he testified yesterday.

Q And he believes he's telling the truth?

A Yes.

Q Now, you state in your report – and I want to refer you to a specific statement that you made – on the diagnostic impression part of the report you state: "The diagnosis is dependent on the presumption that his accusations are untrue. If there is evidence that he is correct, the diagnosis would not apply." What does that basically mean?

A If all of the things he says are true, then it wouldn't be a delusion. It would be a statement of fact.

Q So would it then be important to determine whether what he's saying is true?

A It would be helpful, although some of his – some of the things that he stated were so far out that the probability of them having actually occurred is so low and there are also some things that he said that can't be a hundred percent verified as untrue, but it would certainly be useful to have external corroboration.

Q So in assessing whether he was in fact delusional, it would be important then to try to see how much of what he's saying you could verify and how much you couldn't?

A That would be helpful.

Q And how much could be determined is absolute false or [151] absolute true verses how much is shady; correct?

A That's right. That would be very helpful.

Q What is your opinion on how his mental illness will affect his situation when he's released from custody?

A Well, I'm concerned about his ability to function in routine adult roles. As long as he's preoccupied with these beliefs that he has, then it's very difficult for him to focus on things like work and a living situation and other relationships. There's also concern about the potential for dangerousness. The best statistical predictor of dangerousness is a history of having been dangerous.

THE COURT: Let me interrupt you, Dr. Bennett. Ms. Hillman, how is this relevant to what I have to determine right now?

MS. HILLMAN: I think it's only relevant to the extent, Your Honor, of judging what Mr. Irizarry said yesterday and also in looking at – there was a third-party risk reported to the government and the FBI and I wanted to give some testimony about that.

THE COURT: I know. But how does that relate to his competency to stand trial?

MS. HILLMAN: I think it relates directly in terms of the belief Dr. Bennett has as far as the diagnosis and the actions that he took as a result of that.

THE COURT: I'm not following you.

[152] MS. HILLMAN: Okay. The fact that a psychologist or a psychiatrist, or an attorney for that matter, feels a third-party duty to disclose is something based upon what he saw in Mr. Irizarry and I think it's part of the overall makeup of him.

THE COURT: But I'm still not understanding how that relates to the competency to stand trial.

MS. HILLMAN: I'll change course, Your Honor. I don't think I can explain better than that.

Q Do you think, based upon your diagnosis, that Mr. Irizarry would intentionally try to be difficult with his attorney?

A No.

Q Do you think that he would intentionally lie to his attorney?

A No.

MS. HILLMAN: That's all I have, Your Honor.

THE COURT: All right.

CROSS EXAMINATION

BY MR. BUTLER:

Q Good morning, sir.

A Good morning.

Q First let me ask you just some preliminary questions before we get to the heart of the matter. For how many years have you testified on behalf of the federal defender's office?

A I think the first time was approximately two years ago.

[153] Q Okay. Can you say just as a guesstimate how many times you have overall?

A Five or six.

Q Okay. Have you, in those five or six occasions, have you ever – well, in each of those occasions have you been called on to opine as to whether a defendant is competent to stand trial?

A No. I believe that there were either two or three others where it was.

Q Okay. In those two or three have you ever determined that a defendant was competent to stand trial?

A Not in those two or three, no.

Q Okay.

A Although I didn't make that determination. That determination was made by the Court. It was my opinion.

Q That's right. I'm just asking you about your opinion.

A Right.

Q Now, you said, I believe, that you testified that you went to the Mobile County Jail to meet with the defendant, to drop off an MMPI for him to fill out?

A Yes.

Q Is that correct? When was that? You said that was back in February?

A Yes.

Q And did you have any substantive discussion with him at [154] that time?

A No.

Q And it was just a quick meeting; is that right?

A I don't recall exactly. I think it was just giving him the information to fill it out.

Q And how long was it before you went back to obtain the results from him?

A I think I went back the next day.

Q The next day? And so you weren't there when he was actually filling it out; right?

A Right.

Q Is that something that – is being present at the time that a person who's being assessed fills this out, is that something that's important?

A Not unless you have some reason to believe that somebody else is going to fill it out for him, which I didn't believe.

Q Okay. And you went back the next day and met with him at the Mobile County Jail; right?

A Right.

Q And where did you meet with him when you were there at the jail?

A In one of the lawyer conference rooms.

Q Okay. And how long did you spend with him?

A I think about two hours.

Q Was it just you and him?

[155] A Yes.

Q And have you ever been back to see him since that time?

A No.

Q And have you had any telephone conversations with him since that time?

A No.

Q Have you received any correspondence from him or corresponded with him in any other way since that time?

A I received copies of the correspondence he had written, but no correspondence between the two of us.

Q Okay. And when you met with him during that two-hour period, did you determine whether or not he was on any medicine at that time?

A I'm not certain whether he was taking Paxil at that time or not. I don't believe that he was.

Q Well, Paxil is an antidepressant; correct?

A Correct.

Q If he were on an antidepressant, that could impact his conduct and behavior and conversance with you, but if he wasn't on it that could mean something else again; is that correct?

A It would have some effect on his mood.

Q And when you were with him during the two-hour period, I think the report indicates that he from time to time appeared agitated?

A Yes.

[156] Q But did he ever threaten you or make you feel that you were in any danger of being around him?

A No.

Q And in working up your assessment on this case – and I believe that it's dated – when, what's the date that you completed your report and submitted it to Ms. Hillman?

A My standard practice would be to dictate it that day while it's fresh on my mind. That's most likely what I did.

Q Which would have been February 6th?

A Yes.

Q And that report indicates a diagnosis of delusional disorder persecutory type; correct?

A I didn't specify the type because I thought he had elements of both persecutory type and the jealous type.

Q Okay. Well, let's digress on this for a moment. I've got your report in front of me. And I'm looking under the category Diagnostic Impression. Do you see that?

A Yes. I'm sorry. You're right. I said persecutory type.

Q So that was your diagnosis?

A Yes.

Q And that was a diagnosis that you had concluded as of February 6th?

A Yes.

Q All right. And you never changed that diagnosis; is that right?

[157] A Well, after reading the emails, I see there's also a component of the jealous type. But there's a great deal of overlap between the two and they involve the same kind of thinking. But substantially no, I haven't changed my opinion.

Q But do you need to amend your report?

A No.

Q Okay. And prior to February 6th did you endeavor to understand anything about any prior mental health history in his life?

A I asked him some questions about that. I asked for his opinion about it.

Q What did he tell you?

A He told me that he had been prescribed some psychotropic medications in the past, that he had taken Paxil. And I couldn't determine from what he said if it was Tranzene or trazodone. At some point he had been to a mental health facility in California in the past. He reports that he was sent to a crisis facility after blacking out for 10 days.

Q Is there anything that he told you that would have indicated to you that he had ever suffered a psychosis –

A Yes.

Q – in the past?

A Oh, in the past?

Q Yes, sir.

A I think there's evidence in what he told me that the [158] delusional thinking occurred as early as at least four years ago. So I would consider that to be in the past, yes.

Q But did you verify any of that?

A Verify any of what?

Q Did you follow up with any medical professionals who would have treated him in the past, to talk about his mental state during those prior years?

A No.

Q And did you talk to any others, any attorneys who have ever represented Mr. Irizarry other than Ms. Hillman?

A No.

Q Now, your report indicates that there were four tests that you rendered to the defendant that assisted you in assessing him, in addition to your clinical interviews. And those were the MMPI, the Wechsler, if I pronounce that correctly, the Rorschach, and projected drawing; is that correct?

A That's correct.

Q Now, just with respect to the particular issue of whether the defendant is competent to stand trial, to the extent he can assist in his own defense, which of those were pertinent to your conclusion?

A I think the MMPI is the most pertinent.

Q Okay. And what about the other three; were they of marginal importance? Would that be fair to say?

A Right.

[159] Q And so would you say that the MMPI, in conjunction with your clinical interview of him during that two-hour period, is what has primarily comprised your diagnosis of persecutory type delusional disorder?

A Yes.

Q Now, I believe that you testified that it's your understanding that an elevated score on an MMPI does not necessarily render the test results invalid; is that correct?

A That's correct.

Q And I believe that the document that you provided is – well, let me ask you about those. And please pardon my – how does this thing focus?

(A discussion was held off the record between counsel.)

MR. BUTLER:

Q Now, this, what Ms. Hillman asked you about –

MS. HILLMAN: Do you want a clean one?

MR. BUTLER: No, that's okay.

Q Who wrote this book?

A John Graham.

Q John Graham?

A Yes.

Q And what year was it written?

A Copyrighted 2000.

Q Okay. And I believe you also referred to a James Butcher?

A Yes.

[160] Q Who is James Butcher?

A He's an expert on the MMPI, wrote some early books on the first version, and I would have no clue how many articles he's written on the MMPI, but he's a well-known expert particularly in forensic studies.

Q And going back to the document that Ms. Hillman asked you about, I believe that it – actually a clean copy would be better.

MS. HILLMAN: (Complying.)

MR. BUTLER:

Q Can you see this okay?

A Yes.

Q It says: "Some MMPI-2 users consider any protocol invalid and uninterpretable that has more man 30 omitted items or a T-score greater than 65 on one or more of the standard validity scales." Would you read this as concerning any score of 65 and greater – is that what this means?

A Yes.

Q So it doesn't necessarily mean – it's not any more specific with regard to any other scores greater than 65? In other words, it doesn't distinguish between like the significance of a score between 70 and 75 for example; is that right?

A That's correct.

Q Now, I believe you indicated that you're familiar with [161] James Butcher. Are you familiar with this book – let me zoom this in so you can see it a little bit better. Okay. Do you recognize this book cover?

A I've seen the book.

Q Do you have your own copy of it at your office?

A No.

Q Have you ever used this book as a reference?

A No.

Q Is there a reason why not or is it that you're just not familiar with it?

A There are a number of books out there on the market. This is just not one I've used.

Q It says on the bottom that its published by the American Psychological Association. Are you a member of that organization?

A Yes.

Q And the authors are Kenneth Pope, James Butcher, and Joyce Seelen; is that correct?

A Right.

Q Can you see that okay?

A Not very – there you go. Yes. That's good.

Q If you would, read this paragraph right here beginning with the word "the" until –

MS. HILLMAN: Do you want to give him a copy of it, Steve, and let him –

[162] MR. BUTLER: Would that be easier?

MS. HILLMAN: I think that would be easier than trying to read it on the screen.

MR. BUTLER: Sure.

THE WITNESS: I'm sorry. You wanted me to read it?

MR. BUTLER:

Q Well, let me ask you, first, does this refresh your recollection of anything that you've seen before?

A Not other than the fact that it's essentially identical to the Graham text.

Q Okay. And would you please read where it begins with the L-scale?

A "The L-scale was devised according to Dahlstrom, et al., to identify deliberate or intentional efforts to evade answering the test frankly and honestly. These items asserting high moral value or an unusual quality of virtue were scaled to provide an indication of whether the individual assessed asserts high virtues compared with people in general. Individuals who claim more than a few of these unrealistically positive characteristics are considered to be presenting a favorable view of themselves that is very unlikely to be accurate even for individuals with model lifestyles."

Q Okay. Now, if you will turn to the next page, and can you see where I'm pointing? Right here where it begins: "Blatant distortion"?

[163] A Yes.

Q If you could read that, please?

A It says: "Blatant distortion or conscious manipulation of the personality assessment process is associated with elevations above 70. This fake good

pattern is unlikely to provide much valid personality or symptomatic information."

Q Do you agree or disagree with that statement?

A That it's unlikely to? It's unlikely to in cases where the clinical scales are brought down by that into normal ranges, because the person's not admitting psychopathology. In a pattern where the scores that indicate a serious psychopathology are elevated despite that, that would not be true.

Q Now looking over to the left of where you just read, where it says: "Descriptors associated with elevations of L" –

A Yes.

Q First of all, what was the score on the MMPI that you rendered to the defendant? Do you remember?

A The L-score?

Q Yes, sir.

A 11.

Q Okay. Is that considered high?

A Yes.

Q Very high?

A Yes.

[164] Q And we see descriptors associated with elevations of L. Those items that are listed there, do any of those indicate the presence of a psychosis?

A No. That does not by itself indicate the presence of a psychosis. That's more indicated on the other scales.

Q And I believe that, just to go back to yesterday, you were present for Dr. Buigas' testimony. He testified consistent with what's contained in his report, that he rendered a Georgia competency exam. Do you recall that testimony?

A Yes.

Q And you have now read Dr. Buigas' report?

A Yes.

Q Are you familiar with that Georgia test?

A I've heard of it. I've not used it.

Q Okay. Do you know whether or have you ever taken steps to obtain it?

A No.

Q Okay. Is there any other test that you're familiar with that addresses the issue of competency to assist in one's own defense or to otherwise stand trial?

A There are a couple out there on the market, yes.

Q What are the others?

A The Rogers Criminal Responsibility Scale. There's – there are a couple to assess competency of mentally retarded individuals. There are three to four standardized ones on the [165] market.

Q The Rogers was actually one that Dr. Buigas rendered to the defendant in addition to the Georgia test; is that right?

A Yes.

Q Would you agree that the Georgia test and the Rogers test are more appropriate vehicles to determine whether a defendant is competent than the MMPI that you rendered?

A It depends on the question. In terms of understanding the court process, they certainly speak to that issue of understanding the court process better than an instrument that's designed to assess overall personality.

Q Now, you testified – you have testified that you arrived at your conclusion that the defendant suffers from delusional disorder persecutory type as of February 6th. But I think you also testified that you had not read any of the emails as of the time that you came to that conclusion; is that correct or incorrect?

A Yeah; that's correct.

Q And why didn't you read the emails before coming to that conclusion?

A I was more interested in kind of doing it cold.

Q Why?

A Just to hear what he said and have my impression of him prior to seeing the emails although, to tell you the truth, I didn't really think to ask for them.

[166] Q Well, would you now agree that the emails are a very interesting window into the mind, heart, and soul of the defendant?

A Yes.

Q And I believe that one – please correct me if I'm wrong – one differentiating factor between the diagnosis of delusional disorder and the one that was rendered by Dr. Buigas concerns the long-term nature of his characterological behavior; is that correct?

A That's one of the discriminating factors?

Q Right.

A No.

Q That's not correct?

A No.

Q Is there any way to summarize what you think factually is different between the diagnosis rendered by Dr. Buigas and the one diagnosed by yourself?

A Well, Dr. Buigas was certainly quite correct that personality disorders are longstanding. The basis for those are assumed to have been laid prior to adulthood and therefore they certainly are considered to be long term and chronic. I don't necessarily agree with his opinion that they can't be changed in some way, because I think there are elements of those things that can be changed. The delusional disorder can extend just as long. I've seen people with a fixed delusion [167] for 40 years, exactly the same delusion, that's never changed. And the difference is also that delusional disorder is a psychotic disorder. And the thinking disturbance that's characteristic of delusional disorders essentially, like in Mr. Irizarry' case, substantially incapacitates him from assuming normal adult roles. With a paranoid personality disorder, there are many people who carry on routine roles like working, even having families, at times that have a paranoid personality structure.

Q But isn't it true that he really throughout his entire life has had difficulty adjusting to society in a number of ways; isn't that right?

A That's correct.

Q And how much time did you spend with him talking about his childhood? Very little?

A Some portion of that two hours. I don't remember how much.

Q And did you spend any time at all going through his work background to understand the time

frames that he held various jobs and his reasons for leaving those jobs or being asked to leave those jobs?

A We didn't get into the reasons for being asked to leave the jobs.

Q Okay. And would all that kind of information be important to understand whether any of the so-called delusions that he suffers now are actually the result of a longstanding [168] personality disorder?

A No. Delusions are not a part of those personality disorders. Now, somebody that has a paranoid personality structure can certainly decompensate into a delusional state under very stressful circumstances. So it could be one of the elements, a precursor, or the base which makes it easy for the delusional disorder to develop. But the longstanding nature of it – as I said, he could have a fixed delusion for years and years. He stated yesterday that he intends to follow this through after he gets out of incarceration. And those things, as well, that's certainly possible.

As I said, I've seen people with a delusional disorder that goes back for years literally that has not changed, so that the time frame – the only time frame really that's critically important in diagnosis of delusional disorder is that it's been present for at least one month.

Q Would you agree that a delusion, for these purposes, is a firmly fixed belief that it is in fact false?

A Yes.

Q And those beliefs must be consistent for a period of time, as I believe you said; right?

A Yes.

Q And does that mean that he sincerely and truthfully believes that that particular scenario that he's describing is in fact true?

[169] A Yes.

Q And would behavior consistent with that be that he doesn't pick and choose to whom he tells that among the medical professionals? Is that right?

A No, that's not necessarily true at all.

Q Why is that?

A There are people who are intact enough to know not to mention certain things to other people, perhaps because of the reaction they've gotten before.

For instance, I've had people come and tell me that they have certain types of thoughts that they would not relate to, say, the driver's license people because they are afraid that that would make them not have a driver's license. People will lie about delusions to get out of psychiatric facilities. There are a number of circumstances in which people may be able to put a cap on that in terms of verbal expression of it, and of course it's also true that very few people in any circumstance relate everything they think or feel or everything that they have thought or felt. So there are certainly times where people will relate information one time and not relate that information

another time even when asked the same question. That certainly happens in the legal profession. Attorneys will get information one time from a client and another time the client won't say the same thing. So that's just common in the population.

[170] Q And I want to address the DSM definition of delusional disorder persecutory type. Are you familiar with that?

A Yes.

Q And the diagnostic criteria for that condition?

A Yes.

Q And is it true that the diagnostic criteria for that condition requires that a temporal analysis be conducted to compare mood episodes with delusional episodes?

A In terms of distinguishing it from other types of disorders such as mood disorder with psychotic features, which I think is most certainly what you're referring to, the difference there is in determining whether the basic underlying problem is a mood disorder or a thought disorder, which one is predominant. If the delusions occur only in the presence of depression, then, you know, at discrete times that are associated with depressive episodes you may want to put the mood disorder first.

In Mr. Irizarry's case, certainly he's been depressed. And the temporal connection between that and the delusional system is pretty clear, in that the

events that led up to him developing this delusional system are also negative events that are related to him being depressed. In this case the thought disorder is the most important issue, because there's nothing particularly in the mood disorder that would account for his behavior.

[171] Q Now, I believe that you've listed with Ms. Hillman a number of what you would call delusional scenarios; is that right?

A Yes.

Q And if we may – how many are there?

A How many what?

Q How many scenarios are we talking about?

A I'm not sure what you mean, "scenarios."

Q Well, your testimony is that he has delusions; correct?

A Correct.

Q And these are delusions about discrete issues; is that right?

A In a sense. But it's also – there's a part of that that that's not exactly true, because what happens is as these are validated or not validated or other information comes to light, that they are tacked onto or associated with the core belief that's delusional.

Q Okay. Well, how many – well, I believe you listed a number of items like KKK computer hacking,

believing that his children are being abused; is that correct?

A Yes.

Q Can we list those?

A I suppose.

Q Sure. Let's do that. Is that right?

A Talking about each thing?

Q Sure.

[172] A There are several hundred pages of this.

Q Okay. Can you give me 10? How about that?

A Okay. His wife hacking into the KKK computer software.

Q Okay.

A People following him.

Q Did he say who these people were?

A I know one of the emails referred to the Oswalts. But, of course, he alluded yesterday to the people who assaulted him in South Carolina as well, and they apparently mentioned his name and his wife, so I assume they must have been somehow following him. And there may be others in the emails. I'm not sure.

Q How about the other ones? We'll do five. How about that? A He's traveling to New York, Texas,

South Carolina, Alabama, Florida, and Colorado, and I think I left out Canada.

Q For what purpose?

A It's pretty unclear in the emails. It has something to do, the way I pick up, the way he thought about it has something to do with gathering information that's going to be used for a federal case against his wife.

Q Did he say he'd already taken this trip or was planning to take it?

A Each one of them was different, those were numerous different references, and he was planning to take those trips or he had been in New York two weeks before the 9/11 incident, and several, several others.

[173] Q Okay. And maybe just a few more?

A There are people who devise evil plans for his children.

Q Did he say who those people were?

A I don't think specifically, although I assumed he was referring to the KKK and maybe Kim.

Q Okay. All right. How about one more?

A The California D.A. has told – a California D.A. has told him that he could make a federal case out of what his ex-wife and her associates have done to him.

Q Did he ever indicate who that California District Attorney was?

A No.

Q Did he indicate what county that D.A. would have been in?

A No.

Q So a California D.A. encouraged him to bring federal charges about what, now? I'm sorry.

A A federal case about what his wife and her associates had done to him.

Q Okay. Now, yesterday Ms. Hillman, when she was examining Dr. Buigas, questioned him somewhat pointedly about whether he had verified any of the factual information that he had obtained from the defendant. Did you verify whether or not any of these were true?

A No.

Q And why is that?

[174] A Frankly, I didn't think there was very much of a probability that they were true. I'm also not a detective.

Q Now, with regard to these five right here, for example – I know this is just a snapshot – did you talk to him specifically about whether any of these issues were issues that he was going to insist that his attorney pursue on his behalf in this case?

A No. All of those are from the emails.

Q Oh, okay. So I'm sorry. I was asking you about the basis for the delusional disorder diagnosis on February 6th.

A Oh, okay.

Q And you had not read any of the emails as of that date.

A No, I hadn't read the emails.

Q So none of these would apply; is that right?

A The evil plans for his children would, the KKK would. I'm not sure if he mentioned the California D.A. in our conversation, but he was going to bring a case of some sort. He had reported to me that he had gotten himself caught because that would allow all of the things that he was saying about his wife to come into court. So the fifth one was similar. I'm not sure if he mentioned the California D.A. I don't believe he did in our contact. But he did mention the bringing of a federal case.

Q Well, let me ask you this: Number two, the Oswalts following him, is that a delusion that you understood to exist [175] as of February 6th, or was that something you learned about later?

A Learned about that later.

Q All right. And number three, that he traveled all over the United States of America to obtain information?

A He told me that he had traveled all over the place.

Q Okay.

A I don't think I got as many specific places.

Q Okay. And evil plans for his children?

A Yes.

Q All right. Okay. And did you talk to him about any of those items with regard to whether he was going to insist that his attorney pursue these issues in this court case here in Mobile?

A No, I wouldn't have had any reason to do that.

Q Well, isn't it your opinion that he's not competent to assist in his own defense?

A My opinion doesn't decide that, obviously. My opinion is that he's having a great deal of difficulty communicating accurate information to his attorney and that his inability to do that and his inability to understand the situation, separate from those delusions, makes it very difficult for him to participate actively with his attorney in formulating a plan.

Q But you're not willing to go so far as to say that in your opinion, your professional opinion as a psychiatrist, that he [176] is incompetent to stand trial?

A Oh, I am. I am.

Q So that is your opinion?

A Yes, that is my opinion.

Q Now, you diagnosed him on February 6th with having delusional disorder persecutory type. What is your understanding of the word "persecutory" in that context?

A That other people are doing things to him on a consistent basis.

Q Let's just look at those four examples right there. And I know there are others, but are any of those examples of someone persecuting him or what he perceives to be a persecution of him?

A Well, yes. They all relate to the issue of somebody doing something that took his wife, and his children he sees as – there are certainly some blurring of identity between him and his children and he sees them as co-victims in this situation. So it's all part of the same complex. It's all part of the people doing things that are related to taking his wife and children from him.

Q Now, a separation and divorce in a marriage and an estrangement of one of the parents from his or her children is a traumatic episode in anyone's life; isn't that right?

A Yes.

Q Obviously so. And it was presumably very traumatic for the [177] defendant in this case; is that right?

A Right.

Q And did you discuss with him at all whether any of these delusions, so-called delusions, were really coping mechanisms for him to understand and comprehend why those things had happened to him?

A I don't know if you can call them coping mechanisms, because they certainly aren't coping. Not adequately. But I understand what I think you mean, is that they are reactions to that and his attempts to make sense out of it and understand it and therefore deal with it emotionally rather than –

Q That's better said.

A Right. And that I would agree with. But I wouldn't call them coping mechanisms.

Q Well, did you consider that issue –

A Which is –

Q – in your assessment of the defendant?

A I'm not sure what you mean.

Q Well, did you consider maybe whether these delusions would be explained on that basis?

A I don't think you can explain delusions on the basis of fact.

Q Okay. Well, he must firmly believe it; is that right?

A Yes.

Q And if it was something that he derived in his mind to help [178] him make sense of it, perhaps he doesn't really believe it. Would you agree with that?

A Oh, no.

Q Okay.

A I think he believes it.

Q And other than sending the emails, do you know if he's ever done anything to manifest a desire or to engage in any conduct that would suggest that he really believes these things?

A Well, he apparently did do some traveling in this three- or four-year period, whatever it is. He apparently did make some attempts to see, talk to his wife, et cetera, et cetera, et cetera. He apparently did make some attempts to gather information, to do research, to find – to do some detective work on his own, those types of things.

Q Okay. Now, I'm going to place on this projector a one-page MMPI-2 – looks like some handwritten test results; is that correct?

A It's just a profile sheet.

Q Okay. Do you have in your possession raw data reflecting the results of the MMPI that you rendered that's in addition to this document?

A By "raw data," do you mean the thing where he checked true/false? This is raw data.

Q Right. Your raw data?

A It's his raw data.

[179] Q Okay. And did you do an interpretive or narrative analysis in a written form on the basis of this?

A Yes.

Q You did? Is that contained in your report to the Court?

A Yes.

Q And there's not any other document; right?

A Right; other than his answer sheet itself where he marked true and false to all of the items.

Q Got you. Okay. Let's talk about this for a minute. What is the highest elevation on here?

A Three.

Q Three?

A Hysteria scale.

Q Okay. And is that indicative of a psychosis or is it indicative of a personality disorder?

A It's indicative of dramatic, emotional overreaction. It could be true, which could be present in any number of types of disorders.

Q Okay. Is it necessarily reflective of a psychosis?

A No, not necessarily.

Q What's the second highest elevation?

A Eight. Or eight and – eight and – I guess one might be slightly higher, the first one.

Q This one right here?

A Yes.

[180] Q Okay. And what is that?

A That's the scale that measures and talks about physical health basically. It's called a hypochondriasis scale because that's the old term for it. But it's physical complaints of physical sensations.

Q So that wouldn't be indicative of a psychosis?

A At that level, for somebody who is essentially healthy, yeah, that can definitely be related to a delusion. Something about his ability to understand his own physical processes is quite clearly distorted, because he's reported a huge number of physical symptoms for somebody who, as well as I know, is basically physically healthy. So that may be a level of delusion.

Q Any of these – and I'll just kind of move ahead – which is the elevation that most directly addresses the issue of a psychosis, such as paranoia?

A Can't really say that, because it's a configural approach. The six and eight, the Paranoia Scale and Schizophrenia Scale, certainly do. Although some of

the others, the one scale you mentioned, the third scale, the dramatic overreaction can be related to it, there's – it can help describe what it's like actually. The ones that do, that are the most directly related to that and have the most questions that are directly related to that, are the six and eight scales, the paranoia and schizophrenia.

[181] Q Now, with regard to your opinion about whether the defendant can assist in his own defense in this case, did you get the sense in your interview with him that he had withheld anything from his attorney factually?

A I wouldn't have any way to know that.

Q Well, did you talk to him about the facts of his case?

A I talked to him about the facts of his case and I also talked to him about – asked him about the importance of telling the truth to his attorney. But I wouldn't have any way of knowing if he had told her at that point anything that wasn't – if he had left out anything important.

Q Well, did you ask him whether he had in fact followed through and had told his attorney the facts of the case that he related to you?

A Did I ask him: "Did you tell your attorney the facts of the case?" Probably not.

Q Wouldn't that be important to understand whether he can assist in his own defense, whether in

fact he had communicated the facts of the case to his attorney?

A Oh, no. Because even if he had said he had, it might not be the truth, because he's confused about it.

Q Did you make a followup call to Ms. Hillman to find out what if anything the defendant had conveyed factually to her?

A I don't think I've ever asked her that question, no.

Q And I think you indicated in your report that he was alert, [182] pleasant, and cooperative during your interview with him during that two-hour period; is that right?

A Yes.

Q And that he had a good persistence and frustration tolerance?

A Yes.

Q What does that mean?

A He was able to sit through the intellectual tasks I gave him, the other things I asked him to do, he basically worked all the way through the task without stopping.

Q He wasn't fidgeting; right?

A He was a little fidgety. But that wouldn't have a huge amount to do with it.

Q And did you talk to the defendant about whether he intended to testify in his own behalf if the case went to trial?

A No, we didn't discuss that.

Q And why is that?

A First of all, it would have probably been very premature, and because it was quite a bit of time before this occurred and I'm not particularly – have no particular reason to need to know that for this diagnosis.

Q And did he say or do anything to indicate to you that he intended to thwart his attorney's strategy to defend him in this case?

A Well, saying that the case was related to getting all this [183] information about his ex-wife and her associates into the public forum led me to believe that he was having some trouble understanding what was going to happen between him and his attorney at that point.

Q But you didn't talk to him about whether he needed to defer to his attorney on those issues or whether he would insist that she pursue those issues nonetheless or anything about that; right?

A Right.

Q Now, you diagnosed the defendant back in February with having a psychotic disorder. But can you say as you sit here today that he still suffers from that?

A I saw the symptoms of that yesterday, yes.

Q In what regard?

A He mentioned that he was intending to follow through with this legally and there were other legal things that he was going to do after he was released from confinement. He contended to indicate some things about some of the occurrences that had happened particularly, I think it was, in the year 2000 that didn't seem to tie together very well to me. I don't remember the exact specifics of it. But he still sounded to me yesterday as though he was quite a bit confused about exactly what had happened in the past.

Q But having said that, wouldn't you also agree that he now understands that those issues are not pertinent to this case?

[184] A Say that one more time. I'm not sure I got it exactly.

Q I believe your testimony was that in your opinion, in observing him testify yesterday, that he still appears confused about some of these scenarios that he's described in his past that he's been upset about, like the South Carolina rape incident and so forth; is that right?

A Right.

Q But it doesn't necessarily follow from that that he still can't assist in his own defense; is that right?

A It doesn't necessarily follow directly from that. Although it doesn't, he still seems to have some difficulty communicating facts. And even though he did report that he understands that the case is not about his divorce or his children, that the preoccupation with that and the fact that it's dictating virtually every moment of his life over a period of years still indicates to me that he's going to have some difficulty communicating exactly what has occurred and make decisions based on a realistic prediction of the future rather than on the delusional system itself.

Q But you don't have knowledge of any facts that he's withheld, that he's withheld from his attorney, as you sit here today; right?

A Ms. Hillman has told me that he's told her some things or asked her to do some things that would be very consistent with the delusional system. We haven't gone over the specifics of [185] that.

Q Right. But that's different from whether he has given her already the critical facts in this case; right?

A I think that his communicating inaccurate information and sending her off on a wild goose chase is a relevant fact, because I think it's part of the delusional system.

Q Well, isn't it true that that would just make it difficult and somewhat tortuous [sic] for his attorney, but it still doesn't mean that she hasn't been given the facts that she needs to defend him?

A I'm not certain exactly what facts she needs to defend him. I think that's more her area.

MR. BUTLER: That's all I have. Thank you, sir.

THE COURT: Ms. Hillman?

REDIRECT EXAMINATION

BY MS. HILLMAN:

Q Dr. Bennett, have there been occasions where you have been asked to evaluate clients for the federal defender's office and you have returned reports stating that a particular person is competent to stand trial?

A Yes.

Q Your MMPI results, do they mirror pretty much what happened in Miami?

A Yes.

Q So the fact that you were not there didn't make a [186] difference?

A No.

Q The fact that he may have been taking Paxil didn't make a difference?

A No.

Q And you mentioned in your testimony you and I have spoken about Mr. Irizarry's situation?

A Yes.

Q And we've spoken about difficulties and things he may have been relating to me, things of that nature?

A Yes.

Q So your clinical interpretation is based not only on your observations of him or your reading the emails, but also of your contact with me?

A Yes, and the report from Miami and the essentially identical MMPI interpretation to mine.

Q Okay. I want to talk to you a little bit about a delusional personality or a delusional person. Someone with a delusional system is not necessarily going to willfully lie to someone, are they?

A No, not necessarily.

Q They are going to relate the facts as they believe them?

A Right.

Q They are not going to have difficulty communicating? I mean in terms of they can actually say: "Hey, I think you need [187] to know this or you need to know that"?

A Well, I consider that to be a communication problem.

Q Okay. It's just their communication would be based on the delusional system?

A Right. Distorted communication.

Q And that would affect the attorney-client relationship because his priorities as to what his legal – his priorities of his legal defense may be different from what they should be, based on the delusion system; would that be correct?

A Yes.

Q Now, Mr. Butler made a lot about behaviors he may have engaged in to manifest his delusions. Would, for example, posting messages on a Ku Klux Klan chatboard be a manifestation of a delusion?

A It can be, yes.

Q Especially if those postings said: "My ex-wife's in Alabama and she's got my children and they are half-Puerto Rican and I think you should know she's trying to pass them off in your group"?

A That would be consistent with his delusion system, yes.

Q Would Mr. Irizarry relating that he's gathering evidence of the abuse of his children, or engaging in activities to gather evidence of abuse of his children, be a manifestation of his delusion?

A Yes.

[188] Q Would him traveling various places trying to protect his children be a manifestation of a delusion?

A Yes.

Q Would him gathering addresses of shelters and places he could stay in Mobile be a manifestation of his delusion?

A Yes.

Q Would him requesting his attorney to gather information concerning abuse or to prove any of his other delusional beliefs be a manifestation of a delusional system?

A Yes.

MS. HILLMAN: That's all I have, Judge.

THE COURT: You may step down. Thank you. Does the defense have any other witnesses?

MS. HILLMAN: We do, Your Honor.

MR. WILLIAMS: Your Honor, I would call Ms. Hillman to the stand.

THE COURT: All right.

KAREN LYN HILLMAN

was sworn and testified as follows:

THE WITNESS: I do.

THE CLERK: Thank you. Please be seated.

DIRECT EXAMINATION

BY MR. WILLIAMS:

Q State your full name for the record, please.

A Karen Lyn Hillman.

[189] Q And what is your relationship with Mr. Irizarry?

A I'm lead counsel in his defense.

Q How long have you been representing Mr. Irizarry?

A Since December of 2003.

Q And could you describe for the Court your first contact with Mr. Irizarry?

A Well, my first contact with him was with regard to his detention hearing. And, well, obviously we were appointed and we met afterwards to discuss the issue of detention first. From the very beginning of the representation Mr. Irizarry relayed to me that his children were in danger, they were being abused, his wife was affiliated with the Klan, that she had threatened him just as much as he had threatened her, that the children were in immediate danger, and he denied any mental health – significant mental health history. He indicated some suicidal ideations in the past. He was very disturbed about the situation of his children and we fought the detention issue on the basis of him not being a danger to the community or a risk of flight based upon conversations that I

had with his sister. And at the detention hearing we presented evidence contained in the discovery in this case that his ex-wife had in fact attempted to contact him and members of his family after the institution of a restraining order in South Carolina.

Q And at that point you were acting in belief that the facts he was relating to you were in fact true?

[190] A Yes.

Q And to your view, investigating those facts became part of your representation of Mr. Irizarry?

A Absolutely. The information regarding his ex-wife and her alleged threats of him were critical information, I thought, in establishing her credibility. In looking at the law regarding threatening communications, one of the ways a jury can determine a communication is reasonably threatening to a reasonable person is by looking at the interpretations of the actual victim. So in determining whether Mr. Irizarry or Ms. Smith were telling the truth, you had to try to verify what he was saying to establish impeachment testimony with regard to her.

Q Did you then attempt to verify this information?

A Actually I was instructed by Mr. Irizarry to go and find certain facts which would prove that he was telling the truth and that his ex-wife was lying.

Q How did you go about this and what did you find out?

A Well, I also enlisted the help of my investigator, Dan Stankoski. We conducted a lot of interviews not only with members of Mr. Irizarry's family but with her attorney, we contacted Ms. Smith's attorney in South Carolina, the South Carolina Department of Human Resources, we reviewed all of the discovery. Mr. Butler and Special Agent Bethke were very helpful to us in terms of contact with Ms. Smith.

[191] We had a forensic examination of a hard drive of her computer. We had pictures taken of the children in order to establish the children were not currently being abused. I know that Special Agent Bethke asked Mr. Mertz about his involvement with the Ku Klux Klan and Ms. Smith with her involvement in the Klan, and so we investigated really every nook and cranny we could think of. And it was in the early stages of that investigation that I realized there was a problem.

Q Okay. What did your investigation yield? What did you find out about all of these –

A Well, very early on, in talking to his sister, I was able to determine that his sister had never independently – his sister, Rachael Peters, had never independently seen messages. Mr. Irizarry claimed his ex-wife had sent messages threatening him and that she had sent many messages to him threatening him. He indicated to me that there would be proof of those messages in documentation within his car. I

retrieved that documentation from the FBI and found that all of the allegations or information regarding threats on behalf of Ms. Smith were in Mr. Irizarry's own handwriting. I went to Mr. Irizarry and confronted him with that information that, yes, there were pieces of paper that contained alleged threats from Ms. Smith, but that they were in his handwriting. And he was insistent that that was proof that she was threatening him, that that was admissible evidence, that that was proof [192] basically that he was being threatened as well. And in talking to Ms. Peters about whether she had seen threats, whether she had seen emails that Mr. Irizarry claimed his ex-wife was sending to him, not just the content of them but had she ever seen them herself, she indicated she had not, that the only source of information she had regarding any contact between Mr. Irizarry and Ms. Smith was coming from Mr. Irizarry.

So it was at that point that kind of the bell went off in my head and I said: "Oops, we may need to have a psychological evaluation here."

Also it was suggested to me by Mr. Butler that I might want to have Mr. Irizarry evaluated. So it was with that in mind that I called Dr. Bennett in. And once I got his diagnosis back, it made absolute perfect sense, based upon my contact with Mr. Irizarry and the inaccurate information that I was receiving from him.

In attempting to verify or attempting to investigate many of the allegations, I have found about a 20

percent accuracy rate on Mr. Irizarry' [sic] part. Most of his – and I do believe he is delusional. Most of his delusions center around basic themes: The Ku Klux Klan, the abuse of his children, his ex-wife's infidelity, which I don't know if that's true or not. But the evidence that we attempted to gather that would either support it or refute it more often than not refuted it. The forensic examination yielded no communications other than [193] the ones we knew about between Ms. Smith and Mr. Irizarry. There was no support of any threats on her part to him.

The South Carolina DHR people, Mr. Irizarry was very adamant that he had reported child abuse to the South Carolina DHR, a DHR worker by the name of Melissa, whose name he could not recall. We contacted the South Carolina DHR officials. They indicated there is absolutely no evidence that Mr. Irizarry ever made a complaint with anyone at their agency. The pictures of the children show absolutely no abuse. The –

Q How did you go about getting the pictures of the children? Who did you talk to in terms of determining whether there had been in fact any abuse of the children?

A Well, I spoke with Mr. Butler about how important it was to Mr. Irizarry; because no matter what you say about Mr. Irizarry, he loves his kids and he is sincerely afraid that they are being abused. He is sincerely fearful for their safety. So it was very important, in an effort to try to get the attorney-client

relationship rolling correctly, to verify for him that his kids were not in danger. And I spoke with Mr. Butler about it, and actually some pictures were taken of the kids and the kids are holding a newspaper to verify what date they were taken. And those were provided to me. Mr. Irizarry indicated he did not want to see them. He just wanted me to tell him if the children were okay.

Also recently, according to Mr. Irizarry, a few of his [194] family members have had contact with the children and they also confirmed for him that his children were fine.

Q So some of your efforts, then, were directed at convincing your client that the children were okay, in an attempt to establish an attorney-client relationship that was fruitful?

A Absolutely. That's just one example of actions I took to try to do that. Contacting – there was one witness he was just adamant that we contact her. Her name was Pearl. I can't remember her last name right off the top of my head. But we've actually contacted her twice to try to – because Mr. Irizarry would say: "Pearl will say X, Y, Z, if she's called as a witness. And if she's going to be called as a witness, I want to go to trial." So we would call Pearl and Pearl would say no. It was things like Pearl had seen abuse of their children, Pearl knew that Leah been evicted, and Richard had asked Pearl to take pictures for him. And Pearl was able to say no, Leah had not been evicted; Mr. Irizarry had spoken to her about taking

pictures, but it was to verify adultery, not to verify abuse of the children; that she had never seen Leah be abusive towards the children. And these directly contradicted Mr. Irizarry's ideas of what Pearl would say.

And so when I would return to Mr. Irizarry with any of this information and say: "This doesn't match up to what you're telling me," he would get very upset, very angry, very distraught; it was my fault; it was a conspiracy, that's why [195] the evidence wasn't turning out his way. He was very confrontational about the fact that I couldn't prove what he was saying was true, which as I understand from reading the description of a delusional personality is totally consistent with that diagnosis, that when confronted with evidence that disproves the delusion they become very confrontational, very defensive.

Q So at this time in your relationship with Mr. Irizarry, you had gotten the report back from Dr. Bennett?

A I got the report back from Dr. Bennett probably prior to some of the events I've related. I got the report back from Dr. Bennett in February. The investigation into, for example, Pearl and DHR in South Carolina, as late as ten days ago Mr. Irizarry was still insisting that I contact these persons to obtain information. He has waffled back and forth about whether he was going to plead or go to trial as late as my last meeting with him.

Q So once, however, you determined that there was a problem –

A Yes?

Q – there was a diagnosis of delusion –

A Delusional disorder persecutory type.

Q – did this alter how you attempted to deal with Mr. Irizarry and how did this affect your representation of Mr. Irizarry?

[196] A Well, you know, as soon as I got the diagnosis, I started talking – it definitely affected how I dealt with Mr. Irizarry, because I attempted not to be – to make sure that in my discussions with him I was not confrontational with him, that I let him direct more than me where the conversations went. I talked to him, I kind of let him go a little bit on his ramblings about abuse and these themes that keep showing up and not stopping him so much as just trying to pull him back on track to talk about what I needed to talk about. But I think probably the most critical mistake that I made was when Dr. Bennett diagnosed him, I related to him that he had been diagnosed with delusional disorder persecutory type and he indicated he wanted to read the report. And he's, you know, he's not illiterate, he's definitely not stupid in any way, shape, or form. He's very interested in reading all of the discovery, so I gave him a copy of the report.

Q In fact, you don't contest Mr. Irizarry understands your role, the role of the prosecutor, or the judge?

A Oh, he absolutely understands the process.

Q He understands the process?

A Absolutely. The fact that he's able to give me specific instructions of "go find this witness," "go find this evidence," indicates he understands his role and my job. The problem is once I gave him Dr. Bennett's workup of him, he was sent off to Miami, and when he came back, Mr. Irizarry [197] indicated to me that the doctor in Miami had not found him crazy, that he was not crazy, he was not mentally ill, and that the doctor in Miami had proven that.

And I said: "Well, actually the doctor in Miami found that you did suffer from a mental illness," and he was very upset by that. He was insistent that he was not crazy, he was insistent that there was nothing wrong with him, which, again, is something that's –

Q How does his delusional disorder affect your ability to discuss plea or trial considerations? How does it – does it affect your representation in that way?

A Well, the first – not first – the first time Mr. Irizarry was set for a plea, I had been unable to see him at Metro because he had been moved to Baldwin County. And I talked to him in the second floor holding room of this building, which is a very small

visitation room. For those who haven't seen it, it's about three-by-three on either side, separated by a screen. It's very tight, very close quarters. The attorneys' door opens from the inside, but the defendants' door does not. And I was explaining to Mr. Irizarry the difference in sentence between a plea and a trial, that the plea sentence could be up to five years, a trial sentence could be up to 45 years, at which point Mr. Irizarry balled his fist up, struck the side of the attorney-client room, and began screaming at me that I didn't understand what his pain was, I didn't understand what [198] he was going through. He got very upset.

I immediately took a – I mean, it scared me when he did that. I'm not going to lie to you. It scared me. But I immediately started trying to calm him down by saying: "You have to think about how your plea or your trial is going to affect your children."

He indicated if he was sentenced to five years, when he got out, he would kill his ex-wife, he would also kill his children, and kill her boyfriend, that if he was sentenced to 45 years –

THE DEFENDANT: That's a fucking lie. You know I never told you that. That is a lie.

A He indicated that if he got five years, he would kill himself. And he asked that I not speak with him for a week, to give him time to process the information, which I did.

And I actually communicated that to the Court in changing the competency hearing and the guilty plea dates, because he asked me not to speak with him for a week.

Since that time we've gone back and forth between – even in the course of a meeting, he would want to plead, he would want to go to trial, he'd want to plead, he'd want to go to trial. I would get phone messages saying: "Interview this person. I want to go to trial."

He indicated to me that after he had spoken with his family, which was just about a week to 10 days ago, that they [199] indicated to him they had hired a private investigator, that all three news stations would be covering his trial, he had written four novels regarding it, that they had encouraged him to go to trial, that as soon as he told the jury of the abuse he had suffered at the hands of his ex-wife and the abuse of his children, that he would be acquitted. And then by the end of the meeting he's back at: "I want to plead guilty."

So it's been very difficult to communicate with him because you never know exactly who you're going to get when you show up. And his priorities in terms of what I am to do as his attorney are totally irrelevant to the case.

MR. WILLIAMS:

Q So the delusional aspects continued to affect your relationships and whatever decisions you made,

your discussions regarding pleading or going to trial; is that correct?

A Absolutely, absolutely. The last time I met with him, in fact, he indicated that he had prepared a motion for me to withdraw because I did not have accurate knowledge of the Klan and because I could not accurately remember conversations that we had had – which I think he's just demonstrated – and accused me of lying. He sees my recollections that differ from his as being lies. And so there's a very – I mean, it's impossible to know from one day to the next which fact he's going to hang on, that is going to be the problem.

Q So how would you distinguish the relationship you have with [200] Mr. Irizarry as different from, say, just having a difficult client?

A I think difficult clients are somewhat the norm in this business. But usually with a client who's rational, you talk to them, the client will say: "Go find this information and it's going to prove I am not guilty."

And you go and you investigate and the information's not what the client says, and you come back and say: "Look, I've talked to so and so and such and such, and they are not going to say what you think they are going to say. Really we don't have any way to put on your defense and really you ought to plead."

Generally the client knows that you know that they know that they are lying. So they say: "Okay. Let's just plead."

Difficult clients come in all shapes and sizes. I think the difference with Mr. Irizarry is that he cannot, because he's unable to, understand that what he believes is inaccurate, and therein lies the problem. You know, you can – difficult clients are not hard to deal with. You learn how to deal with them. But with Mr. Irizarry the difficulty has been it doesn't matter how much investigation I do, it doesn't matter how much I try to show him that I'm working for him, he doesn't believe it. I am part of a conspiracy to hide evidence, I'm part of a conspiracy to send him to jail.

[201] Q Would you say that he believes he in earnest is attempting to work with you?

A Yes, absolutely.

Q Okay.

A He believes he's telling me the truth. He sincerely believes what he's saying is important. There's no question about that.

Q So is it a fair statement, then, to say that you cannot effectively counsel, decide issues of pleading or trial with Mr. Irizarry because of his delusional disorder?

A Yes.

MR. WILLIAMS: I think that's all I have.

THE COURT: Mr. Butler?

CROSS EXAMINATION

BY MR. BUTLER:

Q Hello.

A Hi, Steve.

Q I believe that you said that you have had a lot of difficult clients over the years, and I think we all understand that; isn't that right?

A Yes.

Q And do you know that I appreciate some of the particular difficulties that you've had in this case?

A Yes.

Q Do you understand that?

[202] A Yes. And I appreciate your efforts to compensate for them.

Q Sure. And it's not that unusual, though, is it, that clients would send you on what we typically call rabbit trails, to seek out evidence that really just doesn't exist at all?

A Once or twice, no. Over a period of eight months, yes.

Q Right. And there's more of that in this case, certainly, than in the average case?

A Definitely, definitely.

Q Right. And would you also agree that with regard to the facts that you elicit from your client, some of those are going to be true and some of those aren't going to be true; is that right?

A Absolutely.

Q Right. And you need the true facts, the critical facts; right?

A Right.

Q Are there any – you know the facts of this case, don't you?

A I think pretty well, yes.

Q Right. And would you agree that the facts of this case are really encapsulated for the most part in the emails themselves; right?

A Absolutely.

Q And we've tendered almost a thousand pages of discovery in this case, haven't we?

[203] A Yes.

Q Yes. And you have read most of that; right?

A I have.

Q Yes, as I. And you also, as his attorney and experienced in this profession, you understand what the defenses are to a case of this nature arising under section 875(c)?

A Yes.

Q All right.

A And in addition, to the specific defenses to the charge, also the insanity defense.

Q Exactly. And you know or would it be fair to say that, except for some issues of witness credibility, that you already have all the pertinent facts that you need to defend the case?

A Absolutely.

Q And these issues that your client wants you to address, which I know have been very difficult and time-consuming and expensive, the outcome of those endeavors do not – are not dispositive of the issues in this case; isn't that right?

A Not to me, but to him they are.

Q Right. But not to the case.

A Right. Not in my opinion, no. Not in my opinion, absolutely not.

Q Right.

A To him they are a very important part of the case.

Q And he hasn't withheld anything from you, to your [204] knowledge, that you need in order to defend his case independent of these other issues that he wants you to address?

A Viewing the role of a client as sitting in a bubble and letting him run a show, you're absolutely right. But if Mr. Irizarry's competent, I am not the captain, I'm the navigator. So with a competent client, they decide what route their case takes, not me. I'm the one that says: "This is a good idea, this is a bad idea, the judge isn't going to let us do this, the judge is going to let us do that." But the ultimate decision of who to call and how to present a case lies with the client, not with me.

Q Well, true. But in terms of saying objections that are made at trial, that's your domain; right?

A Yes. Now, I will have a client sometimes turn to me: "Object to that, object to that, object to that."

Q And you can accept that or not –

A That's correct.

Q – friendly advice?

A That is correct.

Q And you would attempt to in that case?

A Absolutely.

Q If your client called you and said: "I want you to file a motion pretrial" that you believe in your professional experience, in being an officer of this court, that would be bogus, frivolous, or unwarranted, you wouldn't file it, would [205] you?

A Only in the most extreme situations would I file that. And I'll give you an example. Sometimes you have clients because you are – you have almost a contradictory duty sometimes where you have your duty to the Court under rule 11, and then you have your duty to your client. My duty lies first with my client. So sometimes I will have a client that will order me to file a motion that I believe is frivolous but on its face, based upon the facts not covered by the attorney-client privilege, might not seem 110 percent frivolous, and I might file that to appease the client while professionally I think it's going to bomb. But certainly you need to do that to build trust with your client.

A good example is a competency motion, to be perfectly honestly [sic]. You'll have some clients who say: "I order you to file a competency motion." In my professional judgment, if a client's ordering me to say he's incompetent, he's pretty much competent.

Q Well, beyond issues where there's maybe a clash in judgment, wouldn't you agree that there are some motions that really just are absolutely not allowed under the rules or the law?

A Absolutely, absolutely.

Q And you wouldn't file motions under those circumstances, would you?

[206] A No, no.

Q So if he wanted you to file motions in those circumstances, you just wouldn't do it?

A Right.

Q And has he suggested that you file anything in this case that you believe was either unwarranted under the facts or prohibited by law?

A Yes.

Q What was that?

A He's asked me – it's discovery motions. They are not specifically like procedural motions, but motions for discovery. He's asked for me to obtain a lot of DHR records involving people who are in no way, shape, or form connected with this case. And the only way I could get that was through a motion. So yes.

Q Now, some of these issues that he's wanted you to pursue, you actually didn't really know whether those pursuits would bear any fruit, did you?

A In the beginning, no.

Q So you in good faith embarked to find out what the answer was?

A Absolutely.

Q And it wasn't until after the fact that you learned that there's really nothing to it?

A That's true. But I've continued to investigate what he's [207] wanted me to investigate.

Q And I think you said about 20 percent of the time?

A Right. About 20 percent of the time.

Q So 20 percent of something's better than a hundred percent of nothing; right?

A That's true. That's true. I have a client that's been a hundred percent inaccurate before.

Q So but for that 20 percent, you've got more than what you would have had if he hadn't told you anything?

A Yes.

Q And you have counseled him on whether he will testify at trial if he goes that route?

A Yes.

Q Is there any reason to believe he can't make that decision on some rational basis?

A Yes.

Q What is that?

A He doesn't – well, number one, he doesn't have a rational belief structure. He believes that if he testifies, he will be acquitted based upon the abuse that he suffered. In other words, he sees his testimony as a justification defense, which I've repeatedly tried to explain to him is not allowed in this situation.

Q Well, his testimony yesterday wouldn't really reflect that, though, would it?

[208] A That's true.

Q So how do you describe that?

A He's trying to appear sane. He doesn't want to be found crazy. He is so petrified of going to a mental institution, he is so petrified of someone saying he's mentally ill, that he will behave any way he needs to to be able to preserve the idea that he is right and no one else is right. In other words, his delusional structure is intact.

Q So therefore he really can assist – can assist – in his own defense, though, when he chooses to do so?

A No.

Q Well, he proved that yesterday, though, on the stand, didn't he?

A Actually, I found his testimony yesterday kind of disturbing because a lot of ways he was relating things it was the first time I had heard them that way. When he was answering your questions about "I agree this case isn't about my ex-wife" and "I agree this case isn't about the Klan," that's the absolute first time I've ever heard him present it that way. But he knew if he came in and said: "This case is about my ex-wife and this case is about the Klan," he would be found incompetent.

Q Well, in all fairness to the defendant, yesterday he was in a court of law.

A That's true.

[209] Q And perhaps, you know, he was willing to straighten up and fly a little bit better, if you would pardon the expression?

A I wouldn't dispute that. But assisting in your defense doesn't occur just in a court of law.

Q I understand. But assisting in trial is a huge component of that?

A Well, it's preparation for trial as well.

Q And regardless of any of these issues that he's wanted you to address, has he done anything to actually thwart your strategy in this case?

A Yes.

Q Does that relate to the issue of communication that you testified about?

A No.

Q Okay. What is that?

A He's insisting that he testify.

Q Do you think that a large component between the disconnect between you and your client is because of the physical threats that were imparted on you on that day that you testified about?

A Absolutely not. I have met with him many times, you know, four or five times since then. He's not the first client to pull stuff like that to me and he won't be the last.

MR. BUTLER: That's it. Thank you.

MR. WILLIAMS: I don't think I have anything else to add.

[210] THE COURT: Let me ask a you a couple of questions.

THE WITNESS: Yes, Judge.

THE COURT: You filed a notice of insanity defense in this case.

MS. HILLMAN: I did.

THE COURT: Was that your doing or was that after consultation with him?

MS. HILLMAN: That was my doing, Your Honor.

THE COURT: If he's ruled competent to stand trial and you go to trial with him, do you intend to present an insanity defense?

MS. HILLMAN: If he is found competent, that would be his decision. And it is my understanding that no, that defense would not be submitted. He's prohibited me from asserting that defense.

THE COURT: All right. You may step down.

Is there any further evidence that the –

MS. HILLMAN: No, Your Honor, we rest.

THE COURT: – defense wants to present?

MR. BUTLER: There's nothing further, Your Honor.

THE COURT: I would like to ask Mr. Irizarry a couple of questions.

THE WITNESS: Yes?

THE COURT: Mr. Irizarry, you're still under oath.

THE DEFENDANT: I'm under oath. I understand.

[211] THE COURT: All right. You can stay right there. And I can hear him fine.

Tell me what your reaction is to Ms. Hillman's testimony.

THE DEFENDANT: My reaction is? I did not know that she felt that way. From the beginning of the case she had told me about possibly pleading an insanity case. She had told it to my mom and my sister. It is not the route that I wanted to take. From the beginning I asked her if I can trust her. I believe that I have been faithful in helping her. She has not sought all the information that I have given to her.

In fact, she has revealed personal information about her life which was irrelevant to the case, such as she told me that she understands, according to my emails, that she herself is a bipolar, that she takes medication to wake up and sleep, that she knows what a divorce can be, that she was divorced and lost custody of her son for three years. She tells me these

things, and I personally did not know if I can trust her. I recently was going to make a motion to dismiss her.

When I went to Florida, to Miami, she told me I was there for an evaluation, not for my mental state, but to see if I'm capable of taking the witness stand, you know, if I'm able to come here and know the job of the jury, the judge. I believe that I accomplished that, that I am capable of standing trial. I did not know that I was there to prove to the Court [212] whether I am suffering from any emotional illnesses or not.

THE COURT: Regardless of what you've said – you said you didn't know she felt this way about certain things – regardless of that, was there anything that she said on the witness stand that you say is inaccurate?

THE DEFENDANT: Yeah. When we – when we met, I believe it was here, I can honestly say I had somewhat of a disappointment, emotional backlash. I don't want to call it a breakdown, because I believe that I was in full control of my emotions even though my emotions kind of like came out frustrated. I did not – well, what I said to her, it seems like it doesn't matter. What I recall telling her is – I would say that you can quote me on this. I told her if I can prove the things that I am saying, in five years what is prison going to accomplish for me? I'm still going to have these problems. They are going to be unresolved. And what would stop me from carrying

out my threats if that's what I wanted to do when I got out?

She didn't show any signs of her being scared or anything like that or being misled. She has always told me, even that day, that I was in the driver's seat, that whatever I said that she will go and do for me. I thought that I can help her that way. I did not believe and I still don't, that I did anything that would prohibit her from doing her part, you know, as my attorney. And I just – I believe that she has [213] misinterpreted some of my information. That's why I wanted to testify. That's why I wanted to take the witness stand. I wanted, you know, for the D.A. to look into it. I wanted everyone to see. I know what I'm here for, if you don't mind. Not that I'm going away (indicating). But I've always known from the beginning I would be tried for my crime, which was communicating email threats. I know what this case is about. It doesn't have anything to do with my ex, it has nothing to do with my children. I am being tried for this particular 15 counts of email threats. I understood that clearly.

And I don't know what else to add. I mean, at this point, Your Honor, I want to apologize to the Court and everyone here. But I am going to file a motion to dismiss Ms. Hillman as my attorney at this point; reason being, me and her do not see eye to eye. Okay? She contradicts some of the things that she tells me. And I do not know if it is my privilege to do so, especially this late, but I do not feel – I do not feel that I can trust her.

And regardless of what the psychiatrists say, I believe that it's my privilege. I believe that I have been sincere in the things that I have said. A lot of the things that I requested from her she has not come forward with. She has not spoken – to make it easier, and right in front of the D.A, my mom was a witness to this. And Mrs. Hillman told me she would not put my mom on the stand because of a conversation [214] that she had with Elaine Smith. Okay?

That if I'm crazy and I'm saying things that are delusional, why is it that Joe Peters and Rachael Peters got a message from Pearl, okay, at their home for me to call them, that it was an emergency? What would constitute an emergency that I would have to call Pearl?

If my children were not in danger, why would the Oswalts call me and reveal my wife then, as we were married, why would they reveal her location if they said that I was an evil, abusive person?

Why would my wife seek me?

There are things that Mrs. Hillman says that are in fact not true. But I don't believe that she's sought all the information. I believe that she to some extent has done some of the research and it has come back inconclusive, where she has really nothing to go on. But she really hasn't touched – she hasn't done the things that I have wanted. And it's not a whole lot.

THE COURT: Let me ask you one other thing, if you believe that the information that you

have sought that Ms. Hillman has not been able to substantiate is important to your case, are you saying that?

THE DEFENDANT: Yes, I am.

THE COURT: All right. And yet you say that you understand that it has nothing to do with your case?

[215] THE DEFENDANT: That is correct.

THE COURT: All right.

THE DEFENDANT: The only reason that I wanted this information was, you see, when I did these things, it was mostly for the motive. I knew that I would be incarcerated. I knew the consequences of what I did prior to even coming to court. But I wanted to find out how the children were. I wanted that peace of mind for myself. That peace of mind was given to me by Mrs. Hillman, which has basically left me with nothing else to do but to plead. I have told her this. I have not changed my mind about it.

She keeps coming to me with different ideas. It was – the only thing that I ever wanted from this Court was to be heard and take a plea. That's all I ever wanted. And that's what I intend to do. And at this point I'm going to do a motion to dismiss my attorney. I want a different attorney. I'm going to plead guilty. And I believe that this Court has – has heard pretty much both sides, and I just want to move on with my life and get this over. It doesn't

scare me if I go to a mental hospital, because I'll be helping myself. If there was something wrong with me, I would seriously want to know. I mean, it is my life. I'm still young. I've got a lot of hope. And if that's what it takes, if this Court deems that I need any kind of help, then so be it. Because I believe that I'm not crazy. And I'm going to prove that. Even if it takes [216] a couple of years or whatever, I'm willing to at least prove that much. That's basically what I'm fighting for now, is that I'm not crazy.

THE COURT: All right.

THE DEFENDANT: Thank you.

THE COURT: Mr. Irizarry, I will take up your self-expressed desire to get rid of Ms. Hillman as your attorney after I rule on the motion that's currently pending before me. I'm going to take that under submission and will issue a written order. The proposed plea date will probably have to be moved. But I'm not going to set another one right now until I make my ruling. And so this matter is now taken under submission.

MS. HILLMAN: Thank you, Your Honor.

MR. WILLIAMS: Thank you.

(This matter concluded at approximately 10:53 a.m.)

[217] CERTIFICATE

STATE OF ALABAMA)

COUNTY OF BALDWIN)

I do hereby certify that the above and foregoing transcript of proceedings in the matter aforementioned was taken down by me in machine shorthand and reduced to writing under my personal supervision, and that the foregoing represents a true and correct transcript of the proceedings of said hearing.

I further certify that I am neither of counsel nor of kin to the parties to the action, nor am I in anywise interested in the result of said cause.

/s/ _____

ROY ISBELL, CSR, RPR, RMR, RDR, CRR COURT REPORTER, NOTARY PUBLIC STATE OF ALABAMA AT LARGE

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No. 06-7517

In The Supreme Court of the United States

RICHARD IRIZARRY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

UNITED STATES OF AMERICA,	)	
vs.	)	**CRIMINAL NO. 03-00236-CG**
RICHARD IRIZARRY.	)	
Defendant.	)	

ORDER

On July 20 and 21, 2004, a competency hearing was held, pursuant to 18 U.S.C. §§ 4241(c) and 4247(d) to determine whether the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent he is unable to understand the nature and consequences of the proceedings against him, or to assist properly in his defense. Both parties stipulated that the Defendant is able to understand the nature and consequences of the proceedings against him, and that the only issue before the court at the hearing is whether he is able to assist properly in his defense.

Defendant Irizarry, a 38-year-old Puerto Rican male, testified that he understood that he is charged with sending threatening e-mails to his ex-wife and others during the latter part of 2003. The threats concerned bombings and "taking their lives" in other ways, in retaliation for various acts that Irizarry believes his ex-wife and her "people" carried out

against him, including the loss of custody of his children. He admitted sending the e-mails. His wife left him, taking the children, in May 2000. Irizarry recounted a bizarre story about his belief that his wife became involved with a man named Kim who is a member of the Ku Klux Klan that she met in a Christian chat room on the Internet. This happened sometime after his wife had supposedly "hacked" the KKK website and posted the words to a Prince song, references to Martin Luther King, Jr. and to "freedom rights." Irizarry believed that his wife then became involved with the Klan, which was "out to get" Irizarry because he isn't "white." Some friends of his wife named the Oswalts were, at times, frying to help Irizarry, and at other times, in league with the KKK and his wife's "people." He also testified at some length concerning information obtained from Pearl, a neighbor of his wife's, who would provide him information about his wife's mistreatment of his children.

The defendant also gave a detailed and disjointed account about being kidnaped and sexually assaulted by two men who knew his name and who threatened him to stay away from his (ex) wife and children.

Irizarry testified that he understands the criminal charges against him and that they are not dependent on the actions of his wife or any of her associates. He also understands the criminal process, including the differing roles of his lawyer, the prosecutor and the judge. He testified about his examinations by a defense psychologist, and by the psychological staff at the Federal Detention Center in Miami, and

explained that he withheld some factual information that he testified to at the hearing from the staff in Miami because he felt it was irrelevant to the determination of his competency.

Dr. Buigas, a forensic psychologist with the Federal Bureau of Prisons in Miami, testified that Irizarry was at his facility for a determination of competency from March 9 to May 18, 2004. During that time, Dr. Buigas and a graduate student spent eight hours conducting psychological tests and interviewing the defendant. In rendering his opinion concerning Irizarry's competency, Dr. Buigas also consulted the correctional staff members who interacted on a daily basis with the defendant.

Dr. Buigas described the psychological tests administered to the defendant and his interpretation of the results. The MMPI test, which is used to evaluate psychiatric symptoms and personality characteristics, resulted in a high elevation on the L-scale, or lie scale, indicating that Irizarry was defensive and essentially trying to portray himself with unrealistic morality or virtue. Dr. Buigas testified that this L-scale score invalidated all clinical interpretation of the MMPI test.

The Personality Assessment Inventory, also used to evaluate the same traits as the MMPI, was administered because of the invalid results of the MMPI. Results of this test were likewise determined to be invalid because of elevated scores on certain portions of the test.

The Kaufman Brief Intelligence Test, used to give a brief estimate of a person's intelligence where there's no indication of neural degenerative processes, indicated that the defendant is of average intelligence.

The Booklet Category Test, which assesses brain impairment and neurocognitive functioning, was administered. Dr. Buigas did not testify specifically about the results, but the context of his testimony gave the inference that he found the results to show no significant abnormalities.

The Georgia Court Competency Test was administered to assess knowledge and potential abilities relative to competency to stand trial. The defendant scored 90 on the test. The cut-off score for competency is 70, indicating that the defendant is more than minimally competent to stand trial.

Dr. Buigas diagnosed the defendant as having an anxiety disorder, not otherwise specified, because he felt the defendant displayed mixed anxiety and depressive symptoms. He also diagnosed the defendant as having a borderline personality disorder with paranoid and antisocial features. Dr. Buigas disagreed with the defense psychologist, Dr. Bennett's, diagnosis of a delusional disorder. He did so because the defendant displayed the same paranoid outlook in every aspect of his life, whereas a delusional disorder would tend to be encapsulated into only one aspect or area of his life. Dr. Buigas testified that the e-mails written by the defendant, which constituted the

evidence in the case, gave strong support for his diagnosis because they demonstrated the defendant's pervasive anger, resentment and suspicion. Dr. Buigas also had seen the scores from an MMPI test of the defendant administered by Dr. Bennett, and opined that the results were just as invalid as when his staff had administered the same test to the defendant.

Dr. Buigas was of the opinion that when he saw the defendant in Miami, the defendant was competent to assist in his own defense. He also testified that, even if Dr. Bennett's diagnosis of delusional disorder was correct, that did not mean that the defendant was incompetent to assist in his defense. Having witnessed the defendant's testimony at the competency hearing, Dr. Buigas testified that everything the defendant said and his demeanor were consistent with the diagnosis Dr. Buigas had made while the defendant was in Miami. On cross-examination he admitted that if the defendant is an inaccurate historian, but believes that the history he provides his attorney with is true, then that might impair the defendant's ability to assist his attorney. However, he further testified that, based on his conversations with the defendant about his attorney's performance, although the defendant was not satisfied that his attorney was making good enough efforts to verify his version of events, he had the ability to cooperate and assist his attorney if motivated to do so.

Dr. Thomas Bennett, a psychologist hired by defense counsel, also examined the defendant. In

reaching a diagnosis, he interviewed the defendant, administered several psychological tests, including the MMPI II, to the defendant, reviewed the e-mails and some other correspondence written by the defendant, reviewed the report of examination from the Bureau of Prisons, and talked with defense counsel. Dr. Bennett concluded that Mr. Irizarry suffers from a delusional disorder which interferes with his ability to function adequately in a variety of common roles in life. Dr. Bennett was of the opinion that the MMPI test scores yielded valid results and that they supported his diagnosis of a delusional disorder. Dr. Bennett testified that the defendant's delusional disorder keeps him from being able to assist his attorney because he cannot give accurate information and is likely to send his attorney off on "red herrings" that are consistent only with his delusions but not with the truth. The only reason Dr. Bennett felt the defendant was incompetent to assist his attorney was because of his inability to accurately relay information.

Ms. Hillman, defendant's attorney, testified that when she was first appointed to represent Mr. Irizarry, she believed all of his assertions about his wife abusing the children, the association with the Ku Klux Klan, the threats to himself made by the wife, and many other facts. After much investigation of his claims, she came to understand that, while Mr. Irizarry in fact believed these claims to be factual, they were not true, and she retained Dr. Bennett to test and diagnose the defendant. Because the defendant is very much aware of the criminal process and

his right to make the decisions in his own case, Ms. Hillman provided the defendant with a copy of Dr. Bennett's report. The defendant did not agree that he is mentally ill, and continued to insist that Ms. Hillman investigate his claims. Ms. Hillman testified that his claims were substantiated only about 20 percent of the time. Her relationship with her client deteriorated because he was unwilling to accept that the results of her investigation not only failed to substantiate, but actually conflicted with, his claims. Because Mr. Irizarry is unable to accept that what he believes is not true, he thinks Ms. Hillman is lying to him and that she is part of a conspiracy to put him in jail.[1] Ms. Hillman testified that he continues to believe that if he tells his side of the story (which she believes is a product of delusion), he will be acquitted, even though she has counseled him that there is no defense of justification in this case. He has vacillated between wanting to go to trial and wanting to plead guilty, and Ms. Hillman did not think she could effectively counsel with him on that decision because of his "belief system." Ms. Hillman thinks the defendant is trying to appear not mentally ill because he is afraid of being sent to a mental institution. She had filed a notice of an insanity defense, but the defendant does not want her to proceed with that claim.

After Ms. Hillman testified, the court questioned Mr. Irizarry about his reaction to her testimony. He

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[1] At one point during Ms. Hillman's testimony, the defendant called out that she was lying.

confirmed that he did not trust Ms. Hillman and felt she had misinterpreted some things that he had told her. He reiterated that he understood that the things he wanted Ms. Hillman to confirm were irrelevant to his guilt or innocence of sending the threatening and harassing e-mails, but that they went toward his motivation. He wanted her to corroborate these things for his own peace of mind. He said that he wants to plead guilty but that Ms. Hillman keeps coming up with different "ideas." The only thing he wants to do now is to plead guilty and "move on with my life and get this over."

The court has considered all of the evidence presented at some length, and is convinced that while the defendant is suffering from a mental condition which purportedly impairs his ability to accurately recall events, he is not incompetent to stand trial or to plead guilty. The parties have stipulated that he is able to understand the nature and consequences of the proceedings against him and the court agrees that, despite his mental illness, Mr. Irizarry has amply demonstrated his ability to do so.

The court finds the testimony of Dr. Buigas more convincing than that of Dr. Bennett and therefore finds by a preponderance of the evidence that the diagnosis provided by Dr. Buigas, that the defendant suffers from an anxiety disorder and a borderline personality disorder with paranoid and antisocial features, is more likely correct. Dr. Buigas and his staff had the opportunity to observe, test, and interact with the defendant for a 2-month period. Dr.

Bennett tested the defendant and interviewed him for about two hours, during the month before the defendant was sent to the facility in Miami. The court accepts Dr. Buigas' s explanation of why the defendant believes the things he believes – that those beliefs arise from his paranoia and suspicion of others' motives and are not delusions.

In determining whether the defendant has the ability to assist properly in his defense, the court is guided by the discussion of amnesia's effect on competency in *U.S. v. Rinchak,* 820 F.2d 1557, 1569 (11th Cir. 1987). While Mr. Irizarry does not have amnesia, his condition that causes him to inaccurately remember events is similar enough, in terms of its effect on the ability to assist his attorney, to that of a person who cannot remember events at all for the comparison to be instructive.

> For an amnesiac (or any other impaired defendant) to stand trial, consistent with notions of due process, he must be able to satisfy the ordinary competency standard: that is, he must be able "to consult with his lawyer with a reasonable degree of rational understanding and . . . [have] a rational as well as factual understanding of the proceeding against him." *Dusky v. United States,* 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960); *United States v. Rodriguez,* 799 F.2d 649, 654 (11th Cir.1986).

Id. at 1569.

In applying this standard to an amnesiac defendant, the court should evaluate the nature and extent of the defendant's impairment and determine its impact on the following factors:

> 1. The defendant's ability to take the stand and testify and otherwise participate in his defense;
>
> 2. Whether the amnesia is temporary or permanent;
>
> 3. Whether the crime and the defendant's whereabouts can be properly reconstructed without the defendant's testimony, including any facts giving rise to a defense;
>
> 4. Whether access to government files would aid in preparing for trial;
>
> 5. The strength of the government's case against the defendant.
>
> *[U.S. v.] Mota,* 598 F.2d 995, 998 [(5th Cir. 1979)]; *[U.S. v.] Swanson,* 572 F.2d 523, 526 [(5th Cir. 1978)]; accord *Wilson v. United States,* 391 F.2d 460, 464 (D.C.Cir.1968).

Id.

Defendant's mental condition, according to Dr. Buigas, is longstanding and not likely to change. It is undisputed that the discovery provided by the Government to the defendant properly reconstructs the crime and the defendant's participation in it without the defendant's testimony. Ms. Hillman testified that the prosecution had been helpful in assisting her to

follow up on leads that the defendant provided in an attempt to help her with the investigation of his version of events. The strength of the case is undisputed. Both Ms. Hillman's and the defendant's testimony established that the defendant basically admits to having authored and sent the e-mails, and that he has no legal, (as opposed to equitable) defense to the crimes alleged. It is also true that, while the defendant has the ability to take the stand and testify or otherwise participate in his defense, his perception of the events which motivated his actions is most likely inaccurate. He understands, however, that the facts he believes to be true do not constitute a defense to the charges, and even if he was to present testimony about his motivation to the jury, it would not be the basis for legally absolving him of guilt. There are no exculpatory circumstances hidden by his mental condition. Under these circumstances, the court finds that although the relationship between the defendant and defense counsel may be difficult because of his beliefs, the defendant does have the ability, despite his mental condition, to assist in his defense. He understands the basis of his disagreement with his attorney and is able to distinguish a valid defense from an invalid one.

Accordingly, the court finds that the defendant is mentally competent to proceed. Defense counsel shall advise the court, no later than November 15, 2004, whether the defendant wishes to enter a guilty plea or proceed to trial.

DONE and ORDERED this 5th day of November 2004.

/s/ Callie V. S. Granade
CHIEF UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

UNITED STATES OF AMERICA	*	
	*	**CRIMINAL NO. 03-00236-CG**
vs.	*	
RICHARD IRIZARRY	*	

FACTUAL RESUME

(Filed Nov. 22, 2004)

The defendant, **RICHARD IRIZARRY**, admits the allegations of Count 13 of the Superseding Indictment.

ELEMENTS OF THE OFFENSE

IRIZARRY understands that, in order to prove a violation of Title 18, United States Code, Section 875(c), as charged in Count 13 of the Superseding Indictment, the United States must prove that:

First: That **IRIZARRY** transmitted or caused to be transmitted a communication in interstate or foreign commerce;

Second: That such communication contained a true threat;

Third: That the nature of the threat was to injure the person of another; and

Fourth: That **IRIZARRY** acted knowingly and willfully.

OFFENSE CONDUCT

Defendant, **RICHARD IRIZARRY**, admits in open court and under oath that the following statement is true and correct, and constitutes evidence in this case:

On or about November 5, 2003 at approximately 12:44 p.m., Pacific Standard Time, I knowingly and willfully sent to my ex-wife, Leah Smith, the electronic communication which is set forth in Count 13 of the Superseding Indictment. I sent the electronic communication, or "e-mail," to Leah by use of a computer connected to the Internet. The computer I used to send the e-mail was located in California, and the e-mail was transmitted in interstate commerce because it crossed state lines from California and was received by Leah, in Alabama. I sent this e-mail under the address "run20003us@yahoo.com" and sent the e-mail to Leah at her address at "queenleahrose @hotmail.com".

The subject heading on the e-mail stated that "[y]ou have been warned for the very last time for my patience is gone!" Pertinent portions of the body of the e-mail are repeated verbatim, as follows:

> . . . Books have you read any lately? I have one in particular on how to make bombs for who knows if i have reason to level something. . . . I am here and think it over for when the gun is aim and the blood begins to pour it is then to late. . . . Leah or whom ever are you willing to die for what you believe as i am? Well, will you give me a choice to talk

> or what? I promise you A. and N. that you will soon be with your true Irizarry family and possibly Elaine. I see the future i have wanted to avoid now but this is the only way. No parents is what you children will have. . . . Leah i hope you have a better plan for i am coming and you will answer. You and Kim crying before me and we will see which of you chooses who over the other when i take aim!

Leah and I were officially divorced in 2001, in the Family Court of the Eighth Judicial Circuit, State of South Carolina. Prior to the divorce, two minor children were born of the marriage, N. and A. One of the terms of the Divorce Decree, entered October 31, 2001, is that I be permanently " . . . restrained from calling or coming about Plaintiff [Leah] or the minor children; and, Defendant is further restrained from physically abusing, molesting or harassing Plaintiff or the minor children in any way whatsoever, from following Plaintiff or the minor children on foot or in an automobile, or from entering, calling or coming about the residence, school, or place of employment of the Plaintiff or the minor children." On the basis of this court protection order, and since we separated prior to the divorce, Leah has had full custody of the children, and has since moved to Baldwin County, Alabama with the children and a man named Kim Metz. Since our separation, I have been increasingly frustrated with my inability to see my children.

The e-mail at issue in Count 13 was intended by me to be a true threat to kill or injure the person of

Leah and Kim, my intention was that Leah and Kim take the threat seriously, and I acknowledge that Leah and Kim did take the threat seriously.

Since the divorce, I have sent dozens of other similar e-mails (substantially more than two) to Leah, which also were intended by me to convey true threats to kill or injure multiple persons: Leah, Kim, Leah's mother Elaine Smith, and acquaintances of Leah's named Jim and Susie Oswalt. I sent these e-mails to Leah for a prolonged period of time, until at or near the date I was arrested in connection with this criminal action, in early December 2003. I knowingly sent these e-mails despite being subject to the above-referenced court protection order, and acknowledge that my actions in this regard violated that order.

At all relevant times during the commission of this crime, I acted knowingly and willfully.

AGREED TO AND SIGNED.

Respectfully submitted,

DAVID P. YORK
UNITED STATES ATTORNEY
By:

Date: 11/22/04 /s/ Steven Butler
Steven E. Butler
Assistant United States Attorney

Date: 11-22-04 /s/ Richard Irizarry
RICHARD IRIZARRY
Defendant

Date: 11/22/04 /s/ Lyn Hillman
Lyn Hillman
Counsel for Defendant

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

UNITED STATES OF AMERICA	)	
vs.	)	**CRIMINAL NO. 03-00236-CG**
RICHARD IRIZARRY,	)	
Defendant.	)	

ORDER ON GUILTY PLEA

On **November 22, 2004**, Defendant appeared with appointed counsel, **Assistant Federal Defender K. Lyn Hillman**, and entered a plea of guilty to Count **13** of the **Indictment**, charging the offense of **threatening interstate communications in violation of Title 18 U.S.C. § 875(c)**. The Government was represented by **Assistant U.S. Attorney Steven E. Butler** and the hearing was recorded by court reporter, **Roy Isbell**. Defendant's guilty plea was accepted and Defendant was found guilty as charged.

The following is **ORDERED**:

Defendant shall appear for sentencing on **Wednesday, February 23, 2005**, at **1:00 p.m.** in Courtroom **2B**, U. S. Courthouse, Mobile, Alabama.

The presentence investigation report shall be completed by U.S. Probation and disclosed to the parties on or before **January 19, 2005**.

On or before **February 9, 2005**, the parties shall each file a "Position of (United States) (Defendant) with Respect to Sentencing Factors" in accordance with this Court's Standing Order Number Five. All other requirements and deadlines of that Standing Order shall be strictly observed and enforced.

Pending sentencing, Defendant shall remain in custody.

DONE and **ORDERED** this the 22nd day of November, 2004.

/s/ Callie V. S. Granade
CHIEF UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA

IN RE: IMPLEMENTATION OF SENTENCING PROCEDURES UNDER THE SENTENCING REFORM ACT OF 1984 :

STANDING ORDER

Upon consideration of amended Rule 32 of the Rules of Criminal Procedure, the Court has determined that the following procedures are to be effective January 1, 2004, and are to govern the sentencing procedures under the Sentencing Reform Act of 1984.

WHEREAS, to provide adequate time for the United States Probation Office to prepare the presentence investigation report (PSR), to disclose the PSR to the parties, to review and respond to the presentence submissions filed by the parties, and to comply with such other and further procedures contemplated by the Sentencing Guidelines and this Order, it is hereby

1. ORDERED AND ADJUDGED that the Court and the Probation Office shall be notified through copy of any plea agreement, or in any case, no later than the date of the guilty plea, whether or not the government will move that the defendant receive the benefit of timely acceptance of responsibility (deduction of third point, pursuant to U.S.S.G. § 3E1.1(a)(2)). It is further

2. ORDERED AND ADJUDGED that sentencing proceedings shall be scheduled by each District Judge no earlier than seventy-five (75) days following entry of a guilty or nolo contendere plea or a verdict of guilty, except as otherwise agreed to by the parties or ordered by the Court. It is further

3. ORDERED AND ADJUDGED that the PSR, including guideline computations, shall be completed and disclosed to the parties at least thirty-five (35) days prior to the scheduled sentencing hearing, unless the period is waived by the defendant. It shall be the responsibility of counsel for the defendant and for the Government to contact the United States Probation Office to obtain a copy of the PSR thirty-five (35) days

prior to sentencing. It shall be defense counsel's responsibility to discuss the contents of the PSR with the defendant. The PSR shall be disclosed only to the defendant, defense counsel, and the attorney for the Government. It is further

4. ORDERED AND ADJUDGED that counsel for the parties may retain the PSR in their custody, and counsel for the defendant shall provide a copy to the defendant. However, the PSR is a confidential document, and neither the parties nor their counsel are authorized to duplicate the document or disseminate it or its contents to third parties without prior permission of the Court. It is further

5. ORDERED AND ADJUDGED that, if a party reasonably disputes sentencing factors or facts material to sentencing, or seeks the inclusion of factors or facts material to sentencing in the PSR, it is the obligation of the complaining party to seek administrative resolution of such factors or facts through contact with opposing counsel and the United States Probation Office prior to filing the pleadings referenced in paragraph 6. Disputed factors or facts material to sentencing should be resolved, if possible and practicable, through informal procedures, including telephone conferences. A more formal presentence conference, to be attended by both parties and to be coordinated by the United States Probation Office, is mandatory if disputed factors or facts cannot be resolved informally and, in the opinion of the United States Probation Office, such a conference is necessary

and might be productive in resolving disputed factors or facts. It is further

6. ORDERED AND ADJUDGED that no later than fourteen (14) days prior to sentencing, counsel for the defendant and the Government shall each file a written pleading entitled, "Position of the (United States) (Defendant) with Respect to Sentencing Factors." This pleading shall be filed with the Clerk of the Court with a copy provided to the United States Probation Office and opposing counsel. This pleading should state either that the party adopts the PSR, or should detail the party's position as to any disputed factors or facts, including application of the guidelines or any alleged inaccuracies in the PSR. *When there are disputed factors or facts, the pleading should also state what evidence, including written submissions or witnesses, the aggrieved party wishes to present at the sentencing hearing. This pleading must also include a written statement certifying that the party has conferred with opposing counsel and the United States Probation Office in a good faith effort to resolve any disputed matters.* It is further

7. ORDERED AND ADJUDGED that counsel for the parties shall confer no later than seven (7) days prior to the scheduled sentencing proceeding with respect to the anticipated length of the sentencing and the number of witnesses to be called. If either party reasonably anticipates that the sentencing proceeding will exceed thirty (30) minutes, that party shall file a notice with the Clerk of the Court and shall hand deliver a courtesy copy to the United

States Probation Office no later than five (5) days prior to the sentencing proceeding. The notice shall advise the Court of the number of witnesses to be called and the estimated time required for the sentencing proceeding. It is further

8. ORDERED AND ADJUDGED that no later than seven (7) days prior to the scheduled sentencing hearing, the United States Probation Office shall transmit to the sentencing judge the PSR, including guideline computations, an addendum indicating any unresolved factual disputes or objections by the parties with respect to the application of the guidelines or alleged inaccuracies in the PSR, and a copy of the pleadings filed by the parties entitled, "Position of the (United States) (Defendant) with Respect to Sentencing Factors." The United States Probation Office shall also furnish any revisions of the PSR and the addendum to the attorney for the Government and to the defendant's counsel for disclosure to the defendant. It is further

9. ORDERED AND ADJUDGED that only those factors or facts important to the sentencing determination, or pertaining to any alleged inaccuracies in the PSR as set out in the pleading entitled, "Position of the (United States) (Defendant) with Respect to Sentencing Factors," referenced in paragraph 6, will be issues at the sentencing hearing. Except with regard to any objections made under paragraph 6 that have not been resolved, the report of the PSR shall be accepted as accurate. The Court, however, for good cause shown, may allow a new objection to be

raised at any time before the imposition of sentence. It is further

10. ORDERED AND ADJUDGED that any motion for downward departure pursuant to U.S.S.G. § 5K1.1 shall be filed with the Clerk of Court no later than 24 hours before the sentencing hearing. The motion should state the amount of recommended departure from the guideline range. A copy of the motion shall be *hand delivered or e-mailed* to the Probation Office. It is further

11. ORDERED AND ADJUDGED that failure to comply with any of these procedures may result in the imposition of sanctions. It is further

12. ORDERED AND ADJUDGED that the United States Probation Office shall promulgate policies and procedures with respect to the implementation of this Administrative Order. Further

13. This Court shall monitor the adequacy of existing sentencing procedures promulgated under this Order and make such modifications as the Court deems appropriate. Further

14. This Order amends and supersedes all prior standing orders of this Court regarding the establishment of procedures governing sentencing pursuant to the Sentencing Reform Act of 1984.

DONE this the 23rd day of December, 2003.

/s/ Callie V. S. Granade
CALLIE. V. S. GRANADE
CHIEF UNITED STATES
DISTRICT JUDGE

/s/ Charles R. Butler, Jr.
CHARLES R. BUTLER, JR.
UNITED STATES
DISTRICT JUDGE

/s/ William H. Steele
WILLIAM H. STEEL
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	**CRIM. NO.**
v.	)	**03-0000236-CG-L**
	)	
RICHARD IRIZARRY.	)	

MOTION FOR HOSPITALIZATION OF A CONVICTED PERSON SUFFERING FROM MENTAL DISEASE OR DEFECT PENDING SENTENCING PURSUANT TO 18 U.S.C. §4244

COMES NOW, the Defendant, Richard Irizarry, by and through counsel of record, requesting this Court order him transferred to a mental health facility for treatment, and says in support as follows:

1. This Court has heard the conflicting testimony of two psychologists who, while disagreeing on the diagnosis, agree that Irizarry is suffering from a mental disease or defect.

2. This Court has heard testimony from counsel, and seen the actions of the Defendant, which, in conjunction with the professional's testimony, establishes substantial information sufficient for this Court to find that Irizarry is currently suffering from a mental disease or defect, and is in need of custody for care or treatment in a suitable facility pending sentencing.

3. It has been six months or more since Irizarry's last evaluation.

4. Counsel, who cannot reveal the nature of the information due to the attorney-client privilege, has reason to believe that treatment is necessary for the Defendant.

5. The Defendant is receiving no mental-health treatment at the Baldwin County Jail. The Defendant's mother reports the Defendant presently is not eating well, and is experiencing tremors of an unknown origin.

6. By counsel's computation of the guidelines, with which the Government does not agree, the Defendant's period of incarceration will be almost complete (if he is sentenced to the high end of the guidelines) at the time of his sentencing. The Defendant's guideline range, as computed by counsel, is 12-18 months. The Defendant will have served 12 months in custody as of December 4, 2004. Even if the Defendant is sentenced to 18 months, he will have approximately 14 months completed (excluding good time), leaving little if any time for treatment, provided he is transferred to a BOP facility, which may be unlikely due to the length of sentence remaining.

7. While this Court may consider the rehabilitative needs of the Defendant in setting his sentence, 18 U.S.C. §3553, the Court may not upwardly depart for rehabilitative purposes. *United States v. Brown,* 224 F.3d 1237, 1240 (11th Cir. 2000).

8. AUSA Steve Butler advised he did not oppose this motion.

WHEREFORE, PREMISES CONSIDERED, the Defendant requests this Court order him to be transferred to FMC Rochester[1] for treatment and, if necessary, evaluation, between his plea and sentencing.

Respectfully submitted,

/s/ K. Lyn Hillman
HILLK8765
2 South Water Street,
2nd Floor
Mobile, AL 36602
(251) 433-0910
(251) 433-0686
Lyn_Hillman@fd.org

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was delivered to AUSA Steve Butler by electronic mail on this 22nd day of November 2004.

/s/ K. Lyn Hillman

[1] Counsel is requesting specific placement at FMC Rochester due to her dealings with this facility and its staff, which have been very positive, and its successes with other clients counsel has represented.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
vs.	)	**CRIMINAL NO. 03-00236-CG**
	)	
RICHARD IRIZARRY.	)	
Defendant.	)	

ORDER

This cause is before the court on defendant's motion for hospitalization of a convicted person suffering from mental disease or defect pending sentencing pursuant to 18 U.S.C. § 4244. (Doc. 41).

The defendant entered a guilty plea on November 22, 2004, to a charge of interstate threatening communications in violation of Title 18, United States Code, Section 875(c). He is being held, pending sentencing, in the Baldwin County Jail which does not provide mental health treatment services. The defendant has previously undergone evaluations by both BOP and defense psychologists. Although the mental health professionals on each side disagreed on the diagnosis, all opined that Mr. Irizarry is suffering from a mental condition. Based on the motion and the court's knowledge of Mr. Irizarry from the proceedings in this case, the court finds that the defendant's motion is due to be, and hereby is, **GRANTED**.

It is therefore **ORDERED** that the defendant, **RICHARD IRIZARRY**, be transferred to a facility designated by the Bureau of Prisons, for an examination as promptly as possible, but not to exceed thirty (30) days, for a determination whether the defendant is suffering from a mental disease or defect as a result of which he is in need of custody for care or treatment in a suitable facility. The determination shall be made by at least one qualified psychiatrist or psychologist pursuant to 18 U.S.C. § 4247. This examination should begin immediately upon the defendant reaching the designated facility.

Within fifteen (15) days of the last date of examination, the examining psychiatrist or psychologist shall submit a written report to this court comporting with 18 U.S.C. § 4247(c), particularly Section 4247(c)(4)(D) and (E), containing his or her findings as to the mental condition of the defendant in accordance with this order. If it is the examiner's opinion that the defendant, although presently suffering from a mental disease or defect, does not require custody for care or treatment, the report should also supply the examiner's recommendation as to the kind of alternative treatment the defendant does need. Copies of the report shall be provided to the Assistant United States Attorney and to defense counsel.

The court hereby **RECOMMENDS** to the Bureau of Prisons that **FMC Rochester** be the designated institution for the ordered examination.

The United States Marshal is **ORDERED** to employ direct transport in moving the defendant from this District to the designated institution of evaluation.

DONE and ORDERED this 29th day of November 2004.

/s/ Callie V. S. Granade
CHIEF UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
	)	**CRIM. NO. 03-236-CG**
v.	)	
	)	
RICHARD IRIZARRY.	)	

MOTION TO WITHDRAW

COMES NOW, K. Lyn Hillman, Assistant Federal Defender, to request this Court allow her to withdraw from her representation of Irizarry, and says in support as follows:

1. Counsel has received information from a third part [sic] containing statements attributed to Irizarry. According to this information, it appears Irizarry does not trust counsel's judgment, and has indicated a dissatisfaction with counsel's performance.

2. In the alternative, counsel requests her representation be terminated pursuant to Alabama Rule of Professional Conduct 1.16(b)(3).

3. In the alternative, counsel requests her representation be terminated pursuant to Alabama Rule of Professional Conduct 1.16(b)(6).

4. In accordance with Rule 1.16, counsel has communicated the third-party information to Irizarry, has initiated the order for a transcription of the competency hearing on an expedited basis to provide to the treating staff at FMC Butner,

will provide within a week all psychiatric documents to FMC Butner, and made herself available to that staff should they have any questions regarding her interactions with Irizarry during the representation.

5. Counsel requests this Court appoint CJA counsel for Irizarry, and suggests, in making the appointment, that the Court consider appointing a lawyer of the male gender, who has experience with clients suffering from mental illnesses.

Respectfully submitted,

/s/ K. Lyn Hillman

Assistant Federal
Defender (HILLK8765)
2 South Water Street,
2nd Floor
Mobile, Alabama 36602
(251) 433-0910
(251) 433-0686 facsimile
Lyn_Hillman@fd.org

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served upon AUSA Steve Butler by electronic mail on this 29th day of December 2004.

/s/ K. Lyn Hillman

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

UNITED STATES OF AMERICA	:	
	:	**CRIM. NO. 03-00236-CG**
v.	:	
RICHARD IRIZARRY,	:	

POSITION OF UNITED STATES WITH RESPECT TO SENTENCING FACTORS

(Entered: Feb. 11, 2005)

COMES NOW the United States of America, in accordance with the Standing Order of this Court dated December 23, 2003, and files herein its response to the Presentence Report prepared by the United States Probation Office of this District on January 19, 2005. The United States poses no objection to the matters contained in the Report.

At the sentencing hearing, the United States also intends to call Leah Smith to testify. Ms. Smith is the primary victim of the offense conduct in this action. The testimony of Ms. Smith should last no longer than fifteen minutes.

Also at the hearing, the United States will ask that this Court impose additional conditions of Supervised Release, as follows: (1) attendance at an "offender rehabilitation program" as set forth in U.S.S.G. § 5D1.3(a)(3); and (2) a prohibition of any contact or attempted contact by defendant, directly or

indirectly, with Ms. Smith, her new husband, the minor children, or their respective family members, either in person, by telephone, by correspondence, by electronic mail, or otherwise; *see* U.S.S.G. § 5D1.3(b) and 18 U.S.C. § 3771(a)(1) (crime victims have the right "to be reasonably protected from the accused").

Respectfully submitted,

DAVID P. YORK
UNITED STATES ATTORNEY
By:

s/ Steven E. Butler
Steven E. Butler
Assistant United States Attorney
United States Attorney's Office
63 South Royal Street, Suite 600
Mobile, Alabama 36602
Telephone: (251) 415-7102
Fax: (251) 441-5131
E-mail: steven.butler@usdoj.gov

CERTIFICATE OF SERVICE

I certify that, on February 11, 2005, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to Arthur Madden, Esquire, counsel for defendant, as well as the United States Probation Office.

s/ Steven E. Butler
Steven E. Butler
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA

UNITED STATES
OF AMERICA

v.

RICHARD IRIZARRY

CASE NO.
CR-03-00236-001

DEFENDANT'S RESPONSE
TO PRESENTENCE REPORT

(Entered: Mar. 7, 2005)

NOW COMES the defendant and responds to the draft presentence report as follows:

1. Paragraph 17 is in error in suggesting that a six level adjustment be made pursuant to U.S.S.G. Section 2A6.1(b)(1). That adjustment is appropriate only where "the offense involved any conduct evidencing an intent to carry out such threat . . . "

There is no factual predicated setting out conduct on the part of the defendant evidencing an intent to carry out the threats contained in the emails. The defendant denies such conduct. Compare *United States v. Kirsh,* 1995, 54 F.3d 1062 (2nd. Cir 1995), cert. denied 116 S.Ct. 330, 516 U.S. 927, 133 (defendants purchased firearms and inquired about ammunition during time in which they were sending letters threatening to shoot recipients) with *United States v. Sovie,* 122 F.3d 122 (2nd Cir. 1997) (defendant had arrived at particular location pursuant to prearranged

plan to meet victim and possessed victim's address and telephone number was insufficient to establish that defendant intended to carry out his threats . . .)

The proper offense level, with adjustment for acceptance of responsibility should be 13, with a criminal history category I, which yields a suggested guideline sentencing range of 12 to 18 months.

2. The defendant, who has been in custody since January 6, 2004 should be sentenced at the low end of the guideline.

3. While it does not affect the criminal history category, paragraph 34 is in error. In May 2001, prior to the divorce, Irizarry's brother Efrain went to Clinton Manor to check on the children.

4. Paragraph 39 is in error. The defendant's father died. His mother lives in San Diego. Irizarry is in contact with his mother and family.

5. The presentence report should also reflect that since July 2004 Mr. Irizarry's family has established contact with his children, including visits, gifts and telephone calls. He is now no longer concerned that the children are in danger.

s/ Arthur J. Madden, III
Arthur J. Madden, III
MADDA0656
Attorney for Defendant
MADDEN & SOTO
465 Dauphin St.
Mobile, AL 36602

CERTIFICATE OF SERVICE

I hereby certify that I have on this 7th day of March 2005, served a true and correct copy of the foregoing document by electronic filing on:

Steven E. Butler, Esq.
Assistant United States Attorney
63 S. Royal Street
Suite 600
Mobile, Alabama 36602

s/ Arthur J. Madden, III
Arthur J. Madden, III

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA

UNITED STATES OF AMERICA	CASE NO. 03-00236
V.	THURSDAY, MARCH 17, 2005
RICHARD IRIZARRY,	COURTROOM 2B
Defendant.	MOBILE, ALABAMA

* * * * * * * * * *

SENTENCING
BY THE HONORABLE CALLIE V. S. GRANADE,
CHIEF JUDGE, UNITED STATES
DISTRICT COURT

APPEARANCES:

FOR THE GOVERNMENT:
STEVEN E. BUTLER
United States Attorney
Assistant United States Attorney
United States Attorney's Office
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FOR THE DEFENDANT:
ARTHUR J. MADDEN
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(251) 432-0380

PROBATION: MARC SEIBERT

THE CLERK: MARY ANN BOYLES

DEPUTY
MARSHALS: ROBIN STAFFORD, TINA J. JONES
BILL WAGGONER, MIKE DENNY

COURT REPORTER: ROY ISBELL, CSR, RDR, CRR

Proceedings recorded by OFFICIAL COURT REPORTER Qualified pursuant to 28 U.S.C. 753(a) & Guideline to Judiciary Policies and Procedures Vol. VI, Chapter III, d.2. Transcript produced by computerized stenotype.

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[3] (10:30 a.m., in open court, defendant present.)

THE CLERK: Case set for sentencing in United States of America versus Richard Irizarry, criminal case number 03-236. What says the government?

MR. BUTLER: The United States is ready, Your Honor.

THE CLERK: What says the defendant?

MR. MADDEN: We're ready.

THE COURT: All right. Now, I understand that the government has some testimony they want to put on. But before we get to that, I'll ask you, Mr. Madden, have you and Mr. Irizarry reviewed the presentence investigation report together with the addenda that was prepared?

MR. MADDEN: Yes, we have.

THE COURT: All right. And is there still outstanding your objection to the enhancement for evidence of intent?

MR. MADDEN: There is an objection to the six-point enhancement for conduct evidencing intent. And, of course, we also object to the suggestion in the addendum that the acceptance of responsibility points be taken away. So that's, you know, there's that objection. There is no written objection to that, because at

the time of the written objections that was not an issue. It is now an issue in our view.

THE COURT: Right. I understand. And does the evidence that the government wants to put on pertain to those [4] two objections?

MR. BUTLER: It does, Your Honor. It does. It pertains to the two objections as well as victim impact testimony.

MR. MADDEN: Judge, I'm not sure victim impact is relevant.

THE COURT: I'm sorry?

MR. MADDEN: Victim impact testimony? I'm not sure that's relevant.

THE COURT: Well, I think that's required by law, to allow the victim to testify if she so desires.

MR. MADDEN: But I don't see how it's relevant for –

THE COURT: Well, it may not be relevant, but it's required by law.

MR. BUTLER: Your Honor, I would respectfully ask that in the questioning or answering that the minor children's names not be used during this proceeding, as well as the name of Mrs. Smith's new husband.

THE COURT: All right. I think that's reasonable. You can refer to them by their relationship to her.

MR. BUTLER: Yes, Your Honor.

THE COURT: All right. Mr. Madden, are you going to be presenting any evidence or just cross-examination?

MR. MADDEN: I'll be cross-examining. I may present some evidence.

[5] THE COURT: All right.

MR. MADDEN: I may have one witness.

THE COURT: Go ahead, Mr. Butler.

MR. MADDEN: Judge, I'd ask for the Rule.

THE COURT: I'm sorry?

MR. MADDEN: I'd ask for the Rule.

THE COURT: All right. If there are any witnesses in the courtroom, I will ask that you please step out until you are called as a witness, and after you have testified do not discuss your testimony with any other witness.

MR. BUTLER: Your Honor, Ms. Smith, we believe, would be entitled to remain throughout the entirety of these proceedings.

THE COURT: Yes, I think Ms. Smith is allowed to remain under the law and she will be

allowed to remain. But any other witnesses, please step out until you are called as a witness.

MR. BUTLER: Your Honor, we invoke the traditional exception for the lead case agent, Mr. Eubanks.

THE COURT: Yes.

MR. BUTLER: United States calls Leah Smith to the stand.

THE CLERK: Ms. Smith, I need to get you to raise your right hand.

LEAH SMITH

[6] was sworn and testified as follows:

THE WITNESS: I do.

THE CLERK: Thank you. Please be seated.

DIRECT EXAMINATION

BY MR. BUTLER:

Q Good morning, ma'am.

A Good morning.

Q For the record will you please state your name?

A Leah Smith.

Q And do you live in Baldwin County, Alabama?

A Yes, I do.

Q were you at one time married to the defendant, Richard Irizarry?

A Yes.

Q Can you identify him in the courtroom?

A He's there (indicating).

Q And were you compelled to be here today or did you come here because you wanted to be here?

A I wanted to be here.

Q And why is that?

MR. MADDEN: Judge, that's irrelevant, why she wanted to be here.

THE COURT: Overruled.

MR. BUTLER:

Q If you can please tell the Court why it is that you wanted [7] to be here?

A I wanted to convey my concerns to the Court.

Q About what?

A Basically I've been terrorized and my family's been terrorized and I want the Court to understand the depth of what has happened and what could happen and what his threats are to me.

Q Are you concerned about your safety and the safety of your family when he is released?

A Yes.

Q You see him in the courtroom today. When was the last time you saw him before today?

A In South Carolina, in a courtroom there.

Q How long ago was that roughly?

A Four or five years ago.

Q Is this a hard experience for you today?

A Very.

Q If you need a break, just let us know. Okay.

When were you married to the defendant and when were you divorced from the defendant roughly?

A We were married September 30th, 1995.

Q And were there children born of that marriage?

A Yes.

Q Without giving their names, can you tell the judge who those children are and what their current ages are?

[8] A A boy nine years old and a girl five years old.

Q And when you were married to the defendant, where did you live?

A In San Diego, California.

Q Did you obtain your divorce in San Diego, California?

A No. I obtained it in South Carolina.

Q How did you end up in South Carolina?

A I left the defendant in fear for my life and I traveled as far away as I could possibly get.

Q And do you remember what year that was?

A 2000.

Q And did you obtain a divorce in South Carolina?

A Yes.

Q You say "fear for your safety." Please tell the Court what you mean by that.

A He was, even back then, he was threatening to take the children from me, to hurt, harm me, harm my family members, kill me, kill my family members.

Q Did he perpetrate any physical abuse on you during the marriage?

A Yes.

Q Without going into specifics, unless you want to, please just explain to the judge what you mean by that.

MR. MADDEN: Judge, I object as to relevancy.

THE COURT: Overruled.

[9] A There's many instances of choking, hitting, kicking, slamming into walls, being –

Q Was that as to you?

A Yes.

Q What about the children?

A My son endured some abuse as well.

Q Was there any mental abuse?

A Yes, to both myself and my son.

Q Was that a continual issue or concern during the course of the marriage?

MR. MADDEN: I object to the leading.

THE COURT. Object to what?

MR. MADDEN: Leading.

THE COURT: All right. Overruled.

A Yes, it was.

MR. BUTLER:

Q Did you ever check yourself into a hospital or receive any medical treatment?

A No, I didn't.

Q Why not?

A I was afraid.

MR. MADDEN: Judge, object. We're talking about things that happened at least five years or more ago. And then her mental operation, why she didn't check herself into a hospital in the '90s?

[10] THE COURT: Mr. Madden, this is the victim of this crime and she is allowed to tell the judge whatever she wants to tell the judge in connection with the sentencing. And I'm going to allow her to testify to whatever she wants to testify to. And so your objections are overruled.

MR. MADDEN: Thank you.

A Can you ask the question again?

MR. BUTLER: Yes, ma'am. You were about to tell the court what reason if any you had for not receiving any medical treatment in connection with the physical abuse perpetrated on you by the defendant.

A I was afraid that, you know, hospitals and clinics and such would report those things to authorities and I would be further abused by him when – telling-on-him sort of thing.

Q Did he have a temper?

A He?

Q Yes.

A Very much so.

Q Did you ever spend any time in any shelter appropriate for victims of domestic abuse?

A Yes, sir, two of them.

Q In your South Carolina divorce proceeding did the issue of abuse perpetrated on you and the children come up?

A Yes.

[11] Q And in what way – or was that brought to the court's attention?

A Yes.

Q In what way?

A By my own statement and also a statement from my sister-in-law, which is also his sister-in-law, and her mother, and my friends in South Carolina that encountered him, and my mother. They all issued statements to the South Carolina court.

Q So that included evidence submitted by his own family members, isn't that right?

A Yes, sir.

Q And during the course of those divorce proceedings in South Carolina was there ever an order issued by the judge in that case to protect you and/or your family?

A Yes, sir.

Q Please tell the Court about.

A Well, there was a temporary restraining initially issued, and then at the end of the divorce decree was a permanent restraining order issued.

Q And were you ultimately granted the divorce that you sought?

A Yes.

Q And did the judge make any findings in that case with regard to the abuse?

[12] A Yes. In the divorce decree he states that –

MR. MADDEN: Judge, that speaks for itself.

THE COURT: Overruled.

A He states that I presented enough evidence that he found that I was abused.

MR. BUTLER:

Q And the children as well?

A Yes.

Q Now, as you sit here today in the early months of the year 2005, did the abuse that you suffered at the hands of the defendant, does that have any effect on you now?

A Very much so.

Q Please tell the court what you mean by that.

A Through all of this that has happened, I suffer from post traumatic stress disorder. I see a doctor regularly, I have to take medication, I'll probably be on medication for the rest of my life. I have severe anxiety, severe panic attacks and my day-to-day living is greatly affected and sometimes diminished because of the effects of the abuse and being terrorized.

Q What about the children?

A Both of my children are seeing a counselor at this time. They, as well, feel the effects.

Q Now, did you stay in South Carolina much longer after the divorce?

A No. I did not.

[13] Q Did you come to this state?

A Yes, I did.

Q And why did you come here?

A Because he knew where I lived in South Carolina, had found my residence, showed up at my apartment there and was arrested for breaking the restraining order at that time. I did not feel safe there anymore.

Q And you came to this region of the country; is that right?

A Yes.

Q And you brought your children with you?

A Yes, I did.

Q And did you come with anybody else?

A No, I came by myself.

Q Okay. And are you – and you've been here since that time roughly; is that right?

A Yes.

Q And have you remarried?

A Yes, I have.

Q And you've gotten on with your life?

A I have tried my best to, yes.

Q And how are the children doing now?

A They are –

Q Other than what you've already testified about.

A They are doing wonderful beside that.

Q Now, after you moved here, did the defendant initiate any [14] communication with you?

A Yes.

Q Please tell the judge, the court, roughly when and how did you do that?

A I have the same email address that I had in California that he was aware of, and I started receiving emails to that account from him.

Q And if you could describe what the issues were that he broached in those emails to you early on?

A Early on it was, you know: "I'm going to get you back for leaving me, taking the children." It became escalating, more threatening, but in the beginning it was just more of a desperation type, you know: "contact me now or else" sort of thing.

Q Did he acknowledge any responsibility for the past abuse perpetrated on you or the children?

A No.

Q Did he feel that his estrangement from you and the children was unjust?

A Yes.

Q Why?

A He blamed me completely.

Q Did the emails change over time?

A Yes, I wrote back to one of the emails in the beginning and tried to explain to him that I felt that he had a mental health [15] problem and I tried my best to explain to him how I felt he could go about getting some help. Then he continued to write and I did not write back after that.

Q Did the emails contain threats over time?

A Yes, they did.

Q Threats toward whom?

A To myself, my husband, my mother, my friends in South Carolina.

Q Why was he threatening all these people?

A And my children.

Q Based on what was written in the emails to you, what did you gather was the basis for him wanting to threaten you and the others?

A Some sort of revenge.

Q What did he threaten to do?

A To kill me, kill my husband, kill my mother. lots of descriptions of these acts in great detail, what he would do to my mother, cutting her up, that sort of thing.

Q Did you have a chance to talk to your mother during this?

A Yes.

Q Okay. And what did she tell you?

A She could not understand why he would speak about her in that way, was afraid that he would actually enact those threats, and is still afraid. She doesn't understand why she's involved with him at all.

[16] Q What about your husband and the family friends that you've talked about?

A They are all very concerned for their own safety and mine, the safety of myself and the children. Everyone is afraid that he is going to enact some sort of violence on them.

Q Now, did you report this to the authorities?

A Yes.

Q Approximately when did you do that and who did you talk to?

A I initially contacted DHR in Baldwin County and they instructed me to call the U.S. Attorney's office, who referred me to the FBI. And initially, if I could add, I didn't initially know that this was illegal for him to be threatening me. I really felt that he was going to hurt somebody and I thought maybe my mother was the closest person to him at that time and I really felt that was going to happen, and so I wanted somebody to take my statement or report. I wanted something on record to show, you know, my side of the story, in case he did do something I would have some evidence.

Q When you say your mother was closest to him, at the time your understanding was the defendant was in the San Diego area?

A That was my understanding.

Q And where was your mom?

A In San Diego as well.

Q So you eventually made contact with the FBI right?

A Yes.

[17] Q And then what happened?

A Well, over – over – initially they said that they didn't have quite enough to go on, but to keep sending them the emails that I was getting. And that's what I did. I continued. As I got emails from him, I would forward them to the FBI.

Q And you're aware that the defendant was arrested in connection with this case in December of 2003; is that right?

A Yes.

Q Did you continue to receive threatening emails up until that time roughly?

A Yes.

Q And after the FBI became involved, were you ever contacted by the defendant in any way other than the emails?

A After the – after he was arrested?

Q No, no, after the FBI became involved.

A Yes. I was continuing to receive the emails. In fact, I got one the day he was arrested, I think.

Q Did you or your husband or anyone else ever receive a telephone call from the defendant?

A Yes. In one of my forwarding emails to the FBI, I accidentally responded to his email. I meant to forward the email to the FBI and I added a note saying, you know: "what can I do about this sort of thing?" And I added my phone number. Well, that email went to him because I pressed reply instead of forward.

Q So what happened?

A He called.

Q Who did he call?

A He called our home and my husband answered the phone. And he asked for me, asked for my husband, asked for all of us by name.

Q And what was your take on that? Was that something that you felt threatened by?

A Yes.

Q Why?

A Because he had found – I had inadvertently given him our phone number and I felt that he was just one step closer to harming us.

Q But you all played dumb, so to speak, and acted like he had the wrong number; is that right?

A Yes.

Q Now, after he was arrested, did you or your husband receive any communications or contact from the defendant, to your knowledge?

A Yes. My husband received a Christmas card from him Christmas of 2003.

Q Directed just to your husband?

A Yes.

Q Do you remember, was there a postmark on the envelope?

A Yes.

Q From where?

A Mobile.

Q And how do you know that was from your ex-husband?

A Because it was in his handwriting.

Q Now, since you began to get the emails from the defendant after you moved here up until the time he was arrested, can you just tell the judge, I mean, roughly how many emails you received?

A I've received 255 emails.

Q Okay. And are you aware that in the dement in this case he was charged by the grand jury with sending – with 15 emails in particular; is that right?

A Yes.

Q And are you familiar with those emails?

A Yes, I am.

Q And can I direct your attention to what's referred to as Exhibit 1, which is a tab in the notebook that's in front of you?

A Yes.

Q Can you please tell – well, have you had a chance to review what's contained in Exhibit 1?

A Yes, I've read them all.

Q And what is that?

A Those are the 15 emails that were in the indictment.

Q Are these emails that you received from the defendant?

[20] A Yes.

Q And are these emails that contain threats against you and the other people who you testified about from the defendant?

A Yes.

Q Now, knowing that it's the sole province of the Court to sentence the defendant in connection with this crime that he's been convicted of, is there anything that you would like to convey to the Court other than what you've already expressed?

A I wrote a little note, if you don't mind me reading it. I didn't know whether or not I would get choked up. So I just wanted to make sure I got down what I wanted to say.

THE COURT: All right.

THE WITNESS: Your Honor, I have personally been terrorized by the defendant for many years now. I live in constant fear of when and how he will carry out his threats. My family and friends have also been terrorized by the defendant and live with the same fears. I would like to convey to the court that I'm certain that the defendant will not stop terrorizing me. He is bound and determined to kill, harm, or at minimum terrorize myself, my husband, my children, my mother, my friends. He will stop at nothing to achieve these goals. He is the type of person that we see on the evening news that has killed his ex-wife, his children, and finally killed himself. Many times I have been very afraid that this exact scenario will happen, based on his threats.

[21] I fear that he will act on his threats by any means he can obtain, whether in jail or not. I fear that he will recruit others to carry out his threats as well. I'm asking the court to do whatever it takes to protect my family from the defendant. He will not stop unless he is forced to stop. Please force him to stop.

Not only is he a danger to my family and a danger to society, but he's a danger to himself. This man must be deterred with a proper punishment to protect innocent people. Also the defendant is extremely persuasive. He is able to convince anyone of anything, under the right circumstances. This is a frightening character trait. I believe he will continue to use this

trait to convince others to assist him in enforcing his threats. This makes me not only afraid of him, but others as well.

I just want to mention about how he came across country. Anyway, I had a restraining order against him and he traveled 2,500 miles or something in a van and then was banging on my doors and windows and got arrested on that restraining order in South Carolina and they put him in jail for 30 days, I guess, for that. But anyway, the tow company that towed his van away, they called me and –

MR. MADDEN: Judge, I'm going to object to the hearsay, what the tow company said. Also its remote. It happened at least five years ago.

[22] THE WITNESS: I'm going to testify to what I saw in the van.

THE COURT: Overruled, Mr. Madden. Go ahead.

THE WITNESS: The tow company called me and asked me if I wanted the van. So I said no, I didn't want the van, but I wanted to know if there was any of my belonges in the van because I had left so much behind in California. So I did go to see the van.

What I found in the van when I got there was very disturbing to me. He had his own clothes in the van – there was clothing in the van as well, what you would take anywhere, but also there was duct tape, rope, a hammer, and various tarps.

My friends, the Oswalts, were with me and saw all that as well, and it very much looked to us like he had traveled across country to commit a crime, and that disturbed me. And it still disturbs me. I wanted to mention that.

MR. BUTLER: Thank you, Ms. Smith. I don't have anything further. I would ask that Exhibit 1 be admitted into the record.

THE COURT: All right.

MR. BUTLER: Thank you, ma'am.

THE WITNESS: Thank you.

MR. BUTLER: Hang on. I'm sorry.

(Government's Exhibit 1 was entered into evidence.)

[23] MR. MADDEN: No cross.

THE COURT: All right. You may step down. Thank you.

THE WITNESS: Thank you.

MR. BUTLER: Your Honor, the United States calls Special Agent Eubanks.

THE CLERK: Let me get you to raise your right hand.

MICHAEL EUBANKS

was sworn and testified as follows:

THE WITNESS: Yes.

THE CLERK: Thank you, sir. Please be seated.

DIRECT EXAMINATION

BY MR. BUTLER:

Q Sir, for the record please state your name, the agency with whom you're employed, and your job title.

A Michael Eubanks. I'm employed with the Federal Bureau of Investigation as a special agent.

Q Is there any particular subject matter that your duties typically involve?

A Internet fraud, computer crimes.

Q And are you familiar with the facts of the investigation and the facts you uncovered in the Richard Irizarry case?

A Yes, I am.

Q And have you worked on that case in a formal capacity at one time or another?

A Yes, I have.

[24] Q And are you familiar with the factual record that's been generated in that case?

A Yes.

Q Does that include 302s and other evidence generated in connection with the case?

A Yes, it does.

Q Sir, I'm going to draw your attention to what's been identified as Exhibit 2, which is tabbed as Exhibit 2 in the exhibit notebook in front of you. Are you familiar with that exhibit?

A Yes, I am.

Q Can you please tell the court what that is?

A These are copies of documents from the family court in Lawrence County, South Carolina, which contain testimony from friends and family of Ms. Smith regarding abuses against her by Mr. Irizarry. It also contains a temporary restraining order that was issued in April 2001 against Mr. Irizarry and the final divorce decree from the judge.

Q I believe you said that it contains evidence or information about abuse; is that correct?

A That's correct.

Q And are those – well, in what form was that presented to the court in South Carolina?

A Affidavits from several people that were friends of the family of Ms. Smith regarding abuses against her.

[25] Q And do those affidavits include specific anecdotal examples –

A Yes.

Q – of abuse?

A Yes, they do.

Q Abuse perpetrated on Ms. Smith?

A Yes.

Q And the children?

A Yes.

Q And let me direct your attention to what's been Bates stamped as page 15 within that exhibit.

A Okay.

Q The page that we're talking about, that is part of what document?

A This is part of the temporary restraining order that was issued on April 10th, 2001, during the divorce.

Q And would you please just read the one sentence which is paragraph six at the top of that page?

A Sure. Paragraph six states: "It is reasonable to believe that the life, health, and safety of Plaintiff and the minor children have been threatened by Defendant and that he's imminently capable of carrying out his threats."

Q Now let me direct your attention to Bates stamped page 50, please. Please tell the Court what document that particular page is a part of.

[26] A Page 50 is part of the final divorce decree regarding the marriage of Ms. Smith and Mr. Irizarry.

Q And would you please read for the Court what is contained in paragraph six?

A Sure. Paragraph six states: "I find that Plaintiff has sustained her burden of proof; and that Plaintiff, by and through her witnesses and exhibits, presents credible evidence to support her allegations of physical abuse; and I find it reasonable to believe Plaintiff has been subjected to physical abuse at the hands of Defendant and that life, health, and safety of the Plaintiff and the minor children have been threatened by Defendant and that he's imminently capable of carrying out his threats."

Q That's fine. Now, are you familiar with the documents that have been tabbed as Exhibit 3?

A Yes.

Q Can you please tell the Court what these would appear to be and how they were obtained?

A Exhibit 3 appears to be maps that were printed out from the Yahoo maps web site from the email account or user run2003us@yahoo.com. That contains maps of the Mobile metropolitan area with various notes regarding locations of Ms. Smith and her family.

Q Well, where did these documents come from?

A These were taken from Mr. Irizarry's automobile at the time [27] that he was taken in custody in Escondido, California, on December 4th, 2003.

Q Now, let's talk about the maps for a minute. You've had a chance to review this information?

A Yes, I have.

Q And the maps would appear to be to what, or of what?

A They appear to be of the Mobile area. But they appear to be directions or possible locations with various notes circled regarding possible whereabouts of Ms. Smith, her children's schools, and the workplace of her current husband.

Q When you say "notes," are you talking about some handwritten notes?

A Yes, handwritten notes.

Q And is there anything contained within these documents that indicate any, other than the maps themselves, any plans to come to Mobile?

A Several of these, some of the notes – one of the documents indicates what appears to be travel costs for the Mobile area that lists gas, food, extra, rental car, other, total cost, and that's on the back of a map to the Mobile area, which on the front has notes that include "Greyhound," where Leah went to in 2000.

Q I notice some handwriting on the back pages of some of these maps. Is there any rhyme or reason for that?

A Several of the pages include notes that just appear to be [28] ramblings. others include items similar to what I just spoke about regarding the travel costs, addresses, Zip codes. One particular page, the handwriting states: "It took me almost two years to track Leah to him."

It lists the name: "Kim lives on Government Boulevard in Mobile." He bought his truck at a particular address, and various addresses are listed on this document in the handwriting.

Q Other than the maps and the handwriting that you've described, is there anything else contained within Exhibit 3 that was found in the car?

A There is a printout from a web site known as Intelius, which is a people search web site where individuals can, for a fee, pay for people searches, background checks, divorce records, various things like that. And the printout includes Leah Irizarry's name listed on several columns with the word "address" circled and "available," indicating that a search was done on Ms. Leah Smith and that this would contain records regarding her whereabouts.

Q And I see the last page there, it looks like there's a Google search for a private investigator; is that right?

A Right. It includes – basically it says private investigators in Mobile, Alabama, was the Google search.

Q Now, are you familiar with the 302 that was generated in connection with the arrest of the defendant in December of [29] 2003?

A Yes, I am.

Q And was the defendant interviewed at that time?

A Yes, he was.

Q And did he indicate anything during that interview that would evidence an intent on his part to carry out his threats?

A He made several statements which were included in the FD-302.

Q Such as what?

A Well, I think it would be best just to read right from this FD-302.

Q Sure.

A Page four of the FD-302, the authors of this document wrote: "Irizarry will kill people for his kids. He will 'take a machete and whack their heads off.' He will 'put a bullet in their forehead.' He wants to 'go find her mom and rip her toenails out' and 'make her feel the same pain her kids feel.' He would 'leave

a trail of blood from here to Alabama' to protect his kids."

He further states that he could put a bomb in the car if he wanted, and that he has emailed his wife and told her that he tried to do the right thing.

Q These are things that he told the FBI agents, so they are not in any emails; is that right?

A That's correct.

[30] MR. BUTLER: Your Honor, I have nothing further and would ask that Exhibits 2 and 3 be admitted in the record.

THE COURT: All right.

(Government's Exhibits 2 and 3 were entered into evidence.)

THE COURT: Mr. Madden?

CROSS EXAMINATION

BY MR. MADDEN:

Q The Yahoo maps that are contained in Exhibit 3 show at the bottom right-hand corner dates. The first page is September 18th of 2002?

A That is correct.

Q He was arrested in December of 2003?

A That's correct.

Q So at the time of the arrest this map, if it was run on the date indicated, was a year and a half old or something like that?

A The date may indicate that. However, the dates on the bottom of the web page printouts indicate the date of the computer time of the computer that's used to print this out.

Q So you don't know when this was printed out?

A No.

Q So it actually could be older than 2002, it could be 2001 right?

A That's a possibility.

Q It's as possible as any other date, isn't it?

[31] A Sure.

Q Isn't that what you just told me, that the dates at the bottom don't mean anything?

A They mean that they are the date of the computer that was used to print the document.

Q And Mr. Irizarry never came to Mobile, did he?

A No, he did not.

Q And he never – this Intelius page which is Bates stamped – Exhibit 3, I don't know what it is. May the 11th? That is kind of the tease for that site,

isn't it? It shows you a bunch of names and you have to pay to get the information; isn't that right?

A That's correct.

Q And he never paid to get the information, did he?

A I don't know that.

Q Well, do you know that he did? Do you have anything that shows that he paid to get the information?

A There's no evidence that he did.

Q Did you check?

A No.

Q could you have checked?

A We – we could have checked.

Q And you didn't?

A No.

MR. MADDEN: I don't have anything else.

[32] THE COURT: I'm sorry. Are you through, Mr. Madden?

MR. MADDEN: Nothing.

MR. BUTLER: One last redirect question, Your Honor.

THE COURT: All right.

REDIRECT EXAMINATION

BY MR. BUTLER:

Q You don't know whether he came to Mobile after he initiated those emails to Leah Smith, do you?

Q No.

MR. BUTLER: No further questions.

THE COURT: All right. You may step down.

MR. BUTLER: Your Honor, the United States calls Jack Garris to the stand.

THE CLERK: Mr. Garris, if you will step forward toward the witness stand, I'll swear you in. Let me get you to raise your right hand.

JACK H. GARRIS, JR.,

was sworn and testified as follows:

THE WITNESS: Yes, ma'am.

THE CLERK: Thank you, sir. Please be seated.

DIRECT EXAMINATION

BY MR. BUTLER:

Q Sir, state your name for the record, please.

A Jack Hall Garris, Jr.

Q Okay. And in what county do you live?

[33] A Baldwin.

Q And did you send a letter to the defendant's prior attorney, Lyn Hillman?

A Yes, sir, I did.

Q Do you know the defendant?

A Do I know the defendant?

Q Yes, sir.

A Yes, sir, I do.

Q Can you identify him in the courtroom?

A He's sitting right there, Richard Irizarry (indicating). He was my cellmate.

Q Where?

A In Baldwin County Jail, in V-11.

Q During what period of time?

A For several months in last year, from I guess around October to December.

Q December roughly of 2003?

A No, 2004.

Q I'm sorry. 2004?

A Yes, sir. I left there December the 11th.

Q What were you in jail for?

A Possession of forged instruments.

Q You were his cellmate?

A Right. I slept on the bottom bunk, he slept on the top. They brought him out of lockup into the cell where I was at.

[34] Q Was that roughly the entire time that you were at the jail?

A Oh, no. I was in other cells.

Q How long were you in the cell with him, do you remember?

A I really couldn't say for sure. It was probably several months. It could be two, three months, something like that. I couldn't say for sure.

Q Why did you send a letter to Ms. Hillman?

A For several reasons. Mainly it was my concern about his kids.

Q Why were you concerned about his kids?

A I heard repeatedly stories over and over and over everyday about abuse that the kids were going through from, you know, some man that their mother had married. And another reason, I seen Richard went through a whole lot. One minute he would be just as calm and cool as he could be, the next minute he would be in a rage and beat his head against the wall. And my intention was later for someone to check on the kids to really make sure they were okay. Because I had asked him and he told me that, you know, he had told them that the kids were being

abused and no one was checking on it, no one was doing anything. And in hopes that Richard could get himself some help, that they would get him some help.

Q Well, in your letter you expressed concerns for the safety of Ms. Smith's husband; isn't that right?

A In the letter it's the safety of the kids. (Nodding head [35] affirmatively.)

Q Well, did he ever tell you anything with regard to his plans to injure –

A He was obsessed with the idea of getting rid of Kim.

Q Please tell the Court what you mean by that.

A Killing him, you know. He had talked about doing that hisself. And I told him, I said: "Man, you don't want to do that. You will end up on death row."

And he would say: "At least my kids wouldn't be being abused no more." And he talked about hiring somebody to do it, that he could – when he got out, his sister was going to give him a bunch of money where he could go in and out and his buddies in and out of Mexico and bring drugs back and sell it and that kind of stuff and make the money. And that he had always wanted to live in Costa Rica, that he was going to have his kids and they would go to live there. That's what he said.

Q So he indicated that he would kidnap his children? Take them –

A He indicated that –

Q Hold on.

MR. MADDEN: Judge, I'll object to the leading. If he wants the witness to testify instead of doing it? No one's said anything about kidnapping children. I object to the leading.

THE COURT: All right. Don't lead the witness

[36] MR. BUTLER: Yes, Your Honor.

Q Mr. Garris, did he indicate – please tell the Court precisely what he said, if you remember –

A He –

Q – about what he intended with regard to his children and Costa Rica.

A He said he would have his kids one way or the other.

Q What did he mean?

A Take them out of the country, and that was his exact words.

Q Thank you. Did he indicate a desire to kill anyone else other than his –

A Just his ex-mother-in-law.

Q Did he say why?

A That she was responsible for him and his wife being separated, that she had a lot to do with it.

Q And you indicated something about some people in Mexico?

A He knew some people over there that he could get drugs from, that he knew some guy off the internet that said that he would take care of this guy, Kim, that he was affiliated with some kind of organization and, you know, on and on and on. And he had told me that he had talked with some other guy there at the facility prior to coming into that cell; that this guy knew somebody that worked at the school where his kids were going to school, that he could find out if his kids were really there, and he was wanting to find out where his kids were. They were [37] living in Robertdale. This guy lived in Robertdale and I live in Summerdale.

Q Were these things that he talked about just once or were these things –

A No, sir. They were a daily basis.

MR. BUTLER: I have nothing further. Thank you, Mr. Garris.

THE WITNESS: Okay, okay.

MR. MADDEN: Judge, I'd like any Jencks Act material if they have it and I'd like the Giglio material that they have.

MR. BUTLER: We've already given him 302s of prior interview statements taken of Mr. Garris. He was provided that in discovery.

MR. MADDEN: Anything else?

MR. BUTLER: There's nothing else.

MR. MADDEN: How about Giglio material?

MR. BUTLER: There is no Giglio material. He has not been made any promises or inducements. You can ask him about that if you'd like.

CROSS EXAMINATION

BY MR. MADDEN:

Q Mr. Garris, how old you are you?

A I'll be 47 next month.

Q You were born in 1958?

[38] A Right. The 21st.

Q And is it fair to say that you've made your living over the past 20 years or so as sort of a con man?

A No, sir, it's not.

Q You have how many felony convictions?

A I couldn't really tell you.

MR. BUTLER: Your Honor, I'm going to object. He's referring to convictions that are well more than 10 years old.

MR. MADDEN: Okay.

THE COURT: All right.

MR. MADDEN:

Q The last, say, 10 felony convictions, they occurred within the last year, didn't they?

A No, sir, they didn't. I was locked up a year. They occurred prior to that –

Q August 28th of 2004, you entered pleas in Baldwin County to –

A Right.

Q – 10 felonies, didn't you?

A Yes, sir.

Q And that was within the year, wasn't it?

A I had been locked up right at a year, sir.

Q And you got 15 years concurrent on 10 felonies; is that right?

A I got 15 split and one. I served my one year and I'm doing [39] five years' probation.

Q But those aren't your only – those 10, those were forgery, weren't they?

A Possession of forged instruments.

Q They were forged checks?

A Possession of forged checks, yes, sir.

Q And you've had a problem over the years with passing worthless checks, haven't you?

A Yes, sir, I have.

Q All right. And as a matter of fact, from 2003 up in Marengo County you have at least 11 cases of bad checks, don't you?

A Yes, sir, I did.

Q And you have cases like that in Clarke County, don't you?

A Yes, sir, I did.

Q And you have theft of property felony convictions here in Mobile County, don't you?

A No, sir, I don't. I have a receiving stolen property, supposed to be.

Q Well, in 1988, when you went before Judge Zoghby, didn't you –

A Sir, I don't remember back in 1988 who I went in front of.

Q And I guess your best answer to this is you don't know how many felonies you have, do you?

A No, sir, I don't.

[40] Q You don't know how many convictions of crimes involving moral turpitude, bad checks cases, that you have?

A No, sir, I don't. No, Sir, I don't.

Q And you've got some coming up? You go to court in three months in Marengo County on your most recent felonies, don't you?

A I go to court in Marengo County –

Q In May, don't you?

A In April, the 22nd to be exact, was what I was told my by attorney.

Q Is it Ward Anderson?

A Right.

Q That's your attorney?

A Yes, sir, he is.

Q So your testimony today is what you say he said; right?

A Yes, sir.

Q Now, you said you wanted to let Lyn know this, what's going on; right?

A (Nodding head affirmatively.) I stated to this gentleman right here, it was my concern about the kids.

Q Right.

A I have a 12-year-old son.

Q Okay. Now, you left the Baldwin County Jail on December 11th, didn't you?

A Yes, sir, I did.

[41] Q And you were bound for another jail. I think you went to Clarke County Jail, didn't you?

A Yes, sir, I did, and stayed there three weeks.

Q And you didn't write the letter the 11th, did you?

A No, sir, I didn't. I wrote the letter on the 23rd of December.

Q Or the 12th? You waited a couple of weeks to write the letter?

A Yes, sir, I waited a couple of weeks because it was an everyday thing, that I was being consumed by these stories, that I needed to sit and think. I had no intentions of being in this courtroom today.

Q So you had –

A I had no intentions of even doing that.

Q You had to sit and think for two weeks; is that right?

A Yeah, I had to get my head clear.

Q Okay.

A It was an everyday ongoing thing. Not only with me; we had another cellmate that I don't even remember what his name was, because he slept all the time.

Q Okay. Now, you had had some prior contact with Lyn Hillman, hadn't you?

A No, sir, I have not.

Q Well, your friend Donna had; is that right?

A My friend Donna?

[42] Q Yeah.

A She was her lawyer.

Q Okay. So you asked "my friend Donna" like it's a surprise. What's Donna's last name?

A Her name is Chatman.

Q And she was over here in this court, wasn't she?

A I don't know what court she was in.

Q Well, she was in federal court, wasn't she?

A Right. But I don't know what court she was in, no, sir, I don't.

Q And Donna Chatman is represented by Lyn Hillman; right?

A So is my sister.

Q And your sister is who?

A Karen Austin.

Q And you had some problems with Ms. Hillman, didn't you?

A I did? I have no problem –

Q Well, no, not you. You had some complaints about the way she represented Donna and your sister, didn't you?

A No, sir. I did not. She done a very good job for my sister and Donna.

Q Had you ever met her, Ms. Hillman?

A No, sir, I don't know Ms. Hillman. I seen Ms. Hillman one time when she came to the county jail.

MR. MADDEN: I don't have anything further.

THE COURT: Any redirect?

[43] REDIRECT EXAMINATION

BY MR. BUTLER:

Q So nobody asked you to send that letter, did they?

A No, sir, they didn't.

Q So you don't really have a dog in this fight, do you?

A I have no dog in this fight other than the safety of those two kids.

Q And has anyone, myself included or my office or any agent, promised you anything in connection with your testimony here today?

A No, sir, they have not.

Q Have we asked you to come here and simply tell the truth?

A Yes, sir, you did.

Q And you actually didn't want to come here?

A No, sir. I did not.

Q We had to subpoena you?

A You had to subpoena me. In fact, when I talked to the agent when he came, when the agent called me and told me that he wanted to call me, I told him that I was walking out the door. And the agent is in here – that, you know, I didn't have time. And he said: "Well, we're here in Summerdale now." So I was put in a position that I didn't have a choice.

MR. BUTLER: Thank you, sir.

THE COURT: You may step down.

MR. BUTLER: Your Honor, we don't have any more [44] evidence to put on. Thank you.

THE COURT: Are you offering a letter?

MR. BUTLER: Yes, Your Honor. It'll be Exhibit 4. Thank you.

THE COURT: Any objection?

MR. MADDEN: No.

THE COURT: You may step down, Mr. Garris.

(Government's Exhibit 4 was entered into evidence.)

THE COURT: Does either side have any further evidence? Do you have any evidence you want to present, Mr. Madden?

MR. MADDEN: Yes.

THE COURT: All right.

MR. MADDEN: Call Mr. Irizarry.

THE CLERK: Mr. Irizarry, if you will step forward toward the witness stand, I'll swear you in. Let me get you to raise your right hand as best you can.

RICHARD I. IRIZARRY

was sworn and testified as follows:

THE WITNESS: So help me God, yes, I do.

THE CLERK: Thank you, sir. Please be seated.

DIRECT EXAMINATION

BY MR. MADDEN:

Q Could you tell the Judge your name?

A Richard Israel Irizarry.

[45] Q Mr. Irizarry, on November 22nd, I believe, of 2004 you entered a plea of guilty to one count of sending a threatening communication in interstate commerce; right?

A Yes; that is correct.

Q You also submitted a factual resume that said what the facts of the case were; correct?

A That's correct.

Q And those things happened; isn't that right?

A Yes; that is correct.

Q And you had written a letter to the probation officer that said that you were sorry for what you had done, that your motive was to try to look out for the kids, but you went about it the wrong way; is that correct?

A That is absolutely correct.

Q And did you then and do you now accept responsibility for the things that you've done?

A I've accepted responsibility since the beginning. I knew what I was doing, that it was wrong, and yes, I accept responsibility.

Q Have you said anything since the entry of the guilty plea to this Garris character or anybody else that's contrary to that?

A No, I have not.

Q Let's go back a little bit on this, the conduct thing. There was some testimony today about your divorce in South [46] Carolina. You heard that testimony from your wife?

A Yes.

Q Did you go to court in South Carolina?

A I appeared in court. Out of three times, I was supposed to be there one time in February, the 14th, I believe, of 2001.

Q Okay. Did you have a lawyer in that proceeding?

A I was in the process of getting a lawyer. I was not given sufficient time to acquire one.

Q So the answer is: Did you have a lawyer or not when you went to court?

A No.

Q Was the divorce taken by default; that is, because you didn't appear, they took the divorce against you?

A That is correct.

Q There was some – now, there was a restraining order contained in the divorce decree; right?

A Yes.

Q And in your factual resume you recognize that there was that language in the decree?

A Yes.

Q And we're not contesting that here today, are we?

A No.

Q Your wife, your former wife, testified about the problems that she had had with you and she mentioned one incident about the van. Tell the Judge what the articles in the van were, [47] what that was all about.

A When I went to South Carolina, okay, Mrs. Smith at the time had called my brother Michael Irizarry, and she had told him the family can go visit her in Clinton, South Carolina. okay. I knew about the restraining order. I did not want to go to her place.

So my brother's girlfriend, Anna Rodriguez, her daughter who was, I believe 5, her name is Lilly, and John-John, her son who was almost two years old, they decided that they were going to drive to South Carolina – none of them possessed a license – and in a van from her father, which was hers. She decided that she could drive over there if I would drive the van.

I did drive over there, within a few days and I got a hotel in Greenville, South Carolina. My brother Efram took a chance in going with Anna and the kids

to her apartment. Apparently during the course of maybe a week she was never at home.

Inside the van, okay, I did have tools for the van. The van was in an accident a few weeks before I drove out there. The tarp was really a tent that I had. Okay? I couldn't afford hotels every night, you know, for me and my brother and his girl and the kids, and we were camping out somewhere in Spartanburg. And I don't recall any tarp or anything like that. I needed a hammer to drive in the stakes [48] for the tent. And besides that all I had there was some of my clothes and my brother's clothes and that's pretty much it. I didn't – I wanted to go light because the heavier the van, the more the gas, and we were on a budget. So –

Q Well, let me ask you this: Have you ever come to the Mobile, Alabama, area?

A No, I have not.

Q Other than this being arrested and brought here by the authorities?

A No, I've never come here.

Q Did you go to the Baldwin County area where your former wife lived, and kids?

A No, never.

Q Okay. Did you ever purchase bombs or guns or knives or anything like that to do anything to carry out these threats that you had written in the letters?

A No, I have not. I don't deal with stuff like that.

Q How did you get along with Garris, the fellow that testified in here?

A He was the nightmare. I was afraid of Mr. Garris. Because like, for instance, the first day that I was there, they put me in the cell and he said he knew me and he knew me as a man whose nickname was Church. He had stolen like $80 of my property and he took all my emails, he took every single court paper that I had when I was in lockdown. Mr. Garris [49] immediately pointed to his left arm and he lifted it up and he said: "Do you see this? This is who I am," you know.

Q And what did he have on his left arm?

A I didn't want to look, but it looked like tattoos, a whole bunch of them. And I just like looked at a glance, and he was – he was talking eventually about like white supremacy and things they had, like regular things. And after like three days, you know, he started like talking to me, but it was more like bragging and lying and always trying to belittle me, trying to be better than I am because I was Puerto Rican. And I figured that the best way for me to stop him is by finding like a common interest.

THE COURT: Let me stop you right there, Mr. Irizarry. We have a jury deliberating in another case in the back. They are ready to go into Judge

Steele's courtroom, and I ask that we stop the testimony and allow them to leave the room before we continue.

MR. MADDEN: Thank you.

(The other jury filed through and left the courtroom.)

MR. MADDEN:

Q I think where we left off you were telling us about Mr. Garris' attitude toward you because you were Puerto Rican; right?

A Yes; that is correct.

Q All right. You were trying to find a common interest. Did [50] you find a common interest with him?

A Yeah, we sure did.

Q What was that?

A Automobiles, classical cars.

Q When you would speak with Mr. Garris, would he pump you for information?

A Eventually, yes, he did. The conversation, he always was trying to shift it, wanting to know why I was in there. And he was always, always calling me like the terrorist and stuff like that. And he eventually told me first about his – not his wife, but just his girlfriend, Donna. And he showed me a picture of his son in a baseball uniform, and he was really bragging

about his kid. And I had wonderful children and I had nothing to be ashamed of, so I started talking about my children as well. And I knew through my mom that my son was winning trophies at swimming and stuff like that, so it was a good opportunity to be on a par with him. And I eventually told him about, you know, why I was in there. But not that I trusted him at all, because I never did. I told him I was in there for 15 counts of communications, the threats in emails.

Q As you sit here today, right now, are your children in any jeopardy of you?

A No, no.

Q Is your former wife in any jeopardy of you doing something to her?

[51] A I have no animosity toward her. My only fear was what happened in 2000. And I'm glad that the kids are fine. That was the whole reason why I did what I did. I have – I have inner peace, to be honest, because my mom has visited my children and my family, and therefore I know that the children are fine.

Q You said your mother had come to visit the children. Has this been recently?

A My mom visited me at Baldwin County by surprise on – I think it was July the 13th – but don't quote me, because I can't remember – of last year. And my brother Michael was there.

Q Have they seen your children?

A Yeah. They told me they spent a day at the beach taking pictures and burying each other in the sand. They went to Wal-Mart and bought some toys, and Nathan has really grown, and how beautiful my daughter looked, and just things like this that family would discuss.

Q Okay. Did that give you some peace?

A Oh, yeah, that gave me all the peace in the world. Because me not imagining, not knowing about your kids in four years, not even a little picture of anything, and it really messed up my head. It's like I got depressed and act always really anxious to find out things. But, you know, it pretty much messed up my head.

[52] Q And right now you want to get on with your life?

A Me and – me and my mom and my sister, we have spoken about reinventing myself, getting my truckdriver's license. And my mom's getting ready to retire. We talked about buying a house and start paying child support so I could maybe eventually, down the line, get to see my kids, you know, have some kind of visitation with them. Those are my plans at the moment.

MR. MADDEN: Pass the witness.

CROSS EXAMINATION

BY MR. BUTLER:

Q Sir, you say that you don't have any animosity toward your ex-wife as you sit here today; is that right?

A That is correct.

Q And it's your understanding that your children are being well taken care of?

A I acknowledge that as correct.

Q But you continue to have a tremendous amount of animosity towards your ex-wife's new husband; isn't that right?

A That is not true.

Q That's not true?

A That's not correct.

Q And you heard the testimony of Mr. Garris?

A Yes, I did.

Q And Mr. Garris is just an outright liar, in your estimation; is that right?

[53] A That is exactly correct.

Q And you didn't talk in the jail cell about having Kim – excuse me – her husband killed?

A I did not trust Mr. Garris. I had no reason to talk to him about such things. I never mentioned anything like that to him.

Q Well, you do like to sort of brag and talk big about yourself, don't you?

A Not big about myself. I'm not a braggart. I believe in being honest. I just – I've seen a lot in life and I trust people, but sometimes people want to – like I said, make me out to be like some kind of dummy or something. And I – I put myself in a situation where I can communicate with that person, show them exactly that they are wrong in who I am.

Q You think you're a good communicator?

A Yeah. I would say so, yeah.

Q You mean what you say, don't you?

A Yes.

Q And when you emailed Leah, threatening to kill her, her boyfriend and now her husband, her friends, and her mother, you meant that, didn't you?

A No, I did not.

Q Oh, okay. Just a moment.

Do you have a notebook in front of you, sir?

A No, I do not.

[54] Q Would you turn to what's been tabbed as Exhibit 1?

A Okay.

Q Okay. Now, if you look on the bottom right-hand corner, you will see a series of zeros and some numbers. Do you see those?

A Okay. I'm kind of lost here. You said these numbers right here?

MR. BUTLER: May I approach, Your Honor? These numbers down here (indicating.) Right. And I'm going to refer you to specific numbers.

Q Do you see at the beginning of the second full paragraph: "Leah, you think"?

THE COURT: What page are you on?

MR. BUTLER: I apologize. Page 51.

A Yes, I see it.

MR. BUTLER:

Q And these are your words?

A Yes.

Q Would you please read for the Court that sentence that begins with: "Leah, you think"?

A "Leah, you think I am bullshiting. And when I lose all, and I mean all patience, I will under no circumstance hesitate to set my children free."

Q Okay. Now, would you please move to page 54?

A Okay.

[55] Q Now, the bottom paragraph, do you see, looking about five lines down, the sentence that begins: "You made me violent"?

A Yes.

Q Please read that.

A "You made me violent and now I thirst for blood and vengeance without mercy. Where do I begin to prove to you I am dead serious?"

Q Now, look at three lines from the bottom: "Leah, call the police"? Would you read that?

A "Leah, call the police or whomever, for this I promise you is no joke and Blaine's home can catch fire tonight as she sleeps or you can be shot in the head and buried in the forest.

Q Now Mr. Irizarry, I can go through these emails and pick out instances where you want to make sure Leah is crystal clear that you're dead serious about those threats; is that correct?

A That is correct.

Q Because you were dead serious about those threats?

A No, I was not.

Q Well, you certainly didn't have any gumption about striking your wife when you were married to her, did you?

A You have no proof.

Q Okay. we have no proof?

A It's all hearsay that was never challenged in court and I did not have the opportunity to call my witnesses.

[56] Q So Leah's a liar?

A She was to an certain extent. Some of it is true and some of it is not. I've never beat up on my wife, my ex-wife.

Q And you never physically abused your children either, it's all just fabricated?

A No. As a matter of fact, I have an email, an Instant Message, from Mrs. Smith where she admits I never physically abused my children. Those are her own words.

Q And you're familiar with the South Carolina divorce case because that's discovery in this case; right?

A As far as the restraining order pertains, yes.

Q And you've seen all the affidavits and all the declarations that were submitted by witnesses in that case?

A Yes, I have.

Q Some of them who were your own family members; right?

A They were my brother's wife and mother-in-law.

Q And they are all liars?

A They did not prepare those affidavits. Those were prepared by Mrs. Smith. They did not read English. They are Mexicans. They were illegally in this country, one of them. And those affidavits were sent by Mrs. Smith to Elaine, and Elaine handed them to them to be signed. They did not read all the material that was contained in the affidavits.

Q So it was all concocted?

A By Mrs. Smith, I would say 75 percent of it, yes.

[57] Q Now, when you were arrested, you made a number of comments to the FBI agents; isn't that right?

A Yes. That is correct.

Q And those are evidence – those are statements that you made that further indicated your desire to carry out those threats and your continuing outrage; isn't that right?

A That is not correct. Any father or any mother would say those things in order to protect the children, regardless of the circumstance. It was not implying that I was going to do those things.

Q So Mr. Garris is a liar?

A That's correct.

Q Leah Smith's a liar?

A She is not a liar. She has a way of twisting things and not being totally sincere about the past.

Q And you say you have no desire for revenge?

A I do not. I have no reason for it.

Q But you did have a desire for revenge, didn't you?

A I did at the time. But it was not my purpose for sending the emails. If I may make a quick comment, the reason the emails were sent was because of things that happened between May of 2000 until like the end of 2000. I did not know where Mrs. Smith was living at that time. Her friends called me at my aunt's house and my sister's, trying to locate me, and they gave up her location. Okay. That's how I found Mrs. Smith, [58] not because I found her on my own. Her own friends said the affidavit against me and invited me to South Carolina. Now, because of the events that happened while I was in South Carolina, I was really horrified for what I saw of my children. They were being in shelters and they were being kicked out, she got kicked out of the apartment where she was living at in South Carolina. She called my mom to give her an address that did not exist.

Q So all – I'm sorry.

A Excuse me. Go ahead.

Q So all of the affidavits that were submitted in the South Carolina proceeding were fabricated?

A Jim Oswalt and Susie Oswalt –

Q No, no. Can you answer my question, yes or no? Were they fabricated or are they true?

A They are different affidavits.

Q Yes, yes?

A There's several, the one –

Q Sir, I'm asking you –

A Well, I'm going to get to it, because there were several. The one from Dominga – yes, two of them were fabricated. The one from my brother's side of the family.

Q And the ones from the Oswalts, were they true?

A No, those were not true. Those were incorrect, because they never knew me. They never knew me and my wife when we had [59] a family. They only met me when I was in South Carolina.

Q The Oswalts are liars?

A Yes. Straight-out liars.

Q And Leah's a liar?

A Leah's not a liar.

MR. MADDEN: Asked and answered.

MR. BUTLER:

Q And Leah's mother is a liar?

A Yes.

Q And Jack Garris is a liar?

A Yes, he is.

Q And all of that stuff that you had in your car that your ex-wife testified about related to camping?

A That is absolutely correct.

Q And you camped along the way en route to –

A Sure did. The kids loved it, by the way.

Q Okay. At what campground did you stay in in South Carolina?

A I do not recall the name, but it was maybe like 75 miles from Clinton, somewhere close to Spartanburg.

Q And what did you need the duct tape for? That related to camping as well?

A I did not have duct tape inside my van.

MR. BUTLER: Nothing further.

THE COURT: Any redirect?

[60] MR. MADDEN: I don't have anything further.

THE COURT: All right. You may step down, Mr. Irizarry.

Do you have any further evidence, Mr. Madden?

MR. MADDEN: No. I rest.

THE COURT: All right. Any rebuttal?

MR. BUTLER: No, Your Honor. Thank you.

THE COURT: All right. All right. Mr. Madden, if you and Mr. Irizarry will come around?

MR. MADDEN: I'm sorry. I didn't hear.

THE COURT: If y'all will come around and stand before me?

MR. MADDEN: Yes. Judge, I would ask the court to take into consideration in connection with sentencing the report from Butner which the Court has, and I received a copy. I think it's dated the end of February. In that there are comments not only of Mr. Irizarry but also of his mother that relate to some of these issues that we have discussed.

As far as the six-level enhancement, let me say this: The crime that he was convicted of committing on his guilty plea really has two parts. And it's an objective test. That is a reasonable person would understand that the communication was a threat and that a reasonable person would understand that they are being asked to change their conduct or do something as a result of that threat. That's what he pled guilty to. It's [61] in the factual resume.

The six-level enhancement in 2A6.1(b)(1) is a subjective enhancement. It goes outside of the elements of the offense that he admitted. You have to first find that he intended, subjectively intended, to cause the harm as opposed to objectively causing someone to appreciate that he was threatening, which is the elements of the offense. Subjectively he had to intend to do that and then took a step toward accomplishing it, the conduct. So it's a whole different, I submit, a whole different analysis than the one that goes to the guilt or innocence, the elements of the offense. And I think what the government has done here today is they've ploughed the whole ground.

There's no question he mailed the threats, that the emails constituted threats, that she correctly, as a reasonable person, perceived them as threats. And that's why he's guilty of the offense.

But that's a whole different thing of whether there should be this enhanced penalty for subjectively intending it and then taking a step toward carrying it out.

And I think the evidence is – and maybe the assistant got it right; that he brags, he boasts, and he talks a lot. But that's far different from having the subjective intent to do it and then actually taking steps to carry out the threat. And I'd ask the court not to impose that six-level enhancement, [62] that the proper base offense level is 12. Increase by two levels because of multiple threats; don't dispute it. Increase

by two levels because of the restraining order; haven't disputed it. But beyond that point, no.

As to Garris, in order for you to take away acceptance of responsibility, you have to find that after he made the written statement to probation about his acceptance of responsibility after the entering of the guilty plea on November 22nd of 2004, he did things that were inconsistent with that. They never asked – Garris testified that he left the Baldwin County Jail on December the 11th. So there's a very narrow window of time after the guilty plea when he could have done these things that took it away.

The government failed to meet its burden, and they've got the burden of proof here of showing that whatever communications he made were made in that window after the November 22nd of 2004 and before December 11th, 2004, when Garris was shipped out.

Unless we say: "He's a bad guy, he's dangerous, we don't like him, we're going to give him every enhancement," if you really go by what the law says in an advisory capacity of course, they have failed to meet their burden of proof on the acceptance of responsibility issue because they never got the timing down.

I suggest it never happened, that he's a con man, they [63] didn't even know he had 10 felonies when they put him up there. I asked for the Giglio material, the impeachment material. "Oh, that was over 10 years ago." No, his 10 felonies was a year ago, one of

the most recent cases. So I'd say he's not worthy of belief. But even if you want to believe some of that jailhouse talk went on, you cannot find by a preponderance of the evidence that it occurred after November 22nd of 2004. So you ought not take away his acceptance of responsibility.

He's struggling with mental illness. He's going to get treatment, he's going to do right, he's going to be with us no matter what we do. In three or four years, one or two years, he's going to be on the street. And I think at this point we all need to get together and figure out what will satisfy all our interests; and that's for him to get the help he needs and to get on with his life. So I'd ask the court to impose a base offense level of 12, plus two, plus two, minus three, which would give us a base offense level of 13, criminal history category of I, and a sentencing range of, I believe, 12 to 15 months.

THE COURT: Mr. Butler, do you have any response to that?

MR. BUTLER: Well, we do. On the issue of the enhancement, I read Mr. Madden's position statement. He cites – I assume that this is still his position. He cites [64] two second circuit cases which I assume are for the proposition that the evidence of an intent to carry out the threats appropriate for the enhancement is limited to evidence contemporaneous with the threats themselves or after.

MR. MADDEN: (Shaking head negatively.)

MR. BUTLER: Is that not correct?

MR. MADDEN: That is not the position. The position is the position in Taylor, which is also in the commentary of the Eleventh circuit case Taylor, which is also in the commentary. But I'm saying there has to be the subjective intent on the part of him to carry out the threat and there has to be conduct, not just multiple threats, that evidences an overt step toward accomplishing those threats. That's my position.

THE COURT: Well, as I understand that particular guideline and the commentary, the application notes basically state that the Court shall consider both conduct that occurred prior to the offense and conduct that occurred during the offense. However, conduct that occurred prior to the offense must be substantially and directly connected with the offense –

MR. MADDEN: Yes.

THE COURT: – under the facts of the case taken as a whole. And to me it's obvious that Mr. Irizarry's conduct has been a course of conduct for a period of years now, in [65] connection with the relationship that he had with Ms. Smith and those connected with her.

MR. MADDEN: Just if I could, just so we're talking about the same thing, it's not that the conduct whatever it is makes the recipient believe it's going to happen –

THE COURT: I understand what you're saying. You're saying if he has to intend it.

MR. MADDEN: It's whether he intended it.

THE COURT: Then he has to take some step toward it.

MR. MADDEN: Right.

THE COURT: And what I have found – and I have listened to Mr. Irizarry testify on numerous occasions, now, in connection mostly with his competency hearings. I find him to be a very manipulative person. I find that he can convince or he can attempt to convince – and very convincingly, too – that he intends one thing when his actions belie what he's saying. And I think that's what we have here. He wants you to believe that, although he made all these threats, he never intended to carry them out. However, I think by a preponderance of the evidence that is not the case. We have a situation where his ex-wife left him to get away from a very bad situation, and from that point on Mr. Irizarry has engaged in conduct which deliberately set out not only to terrorize her but I think, based on the evidence that we have presented, he intended to carry out one or more of the acts and the threats.

[66] And the evidence is that he not only made those threats, but made them on numerous occasions and took the steps of going on the internet, finding out the general area in which she lived, first in South Carolina. Then when she moved to this area, he did it

here. He actually traveled to South Carolina, and I do not credit Mr. Irizarry's testimony concerning the purpose for which those materials were in the van that he had and his denial of the fact that there was duct tape. To me it is very suspicious.

And then when the emails continued, when the emails that are part of this offense were sent to his ex-wife while she was living in this area, and the conduct that he has engaged in, by statements that he has made at the time of his arrest and even post arrest to Mr. Garris – and I do credit Mr. Garris' testimony. The things that he says and Mr. Irizarry said are entirely consistent with what Mr. Irizarry has told this Court and what Mr. Irizarry said in the emails, and I don't see how Mr. Garris could make them up out of whole cloth if Mr. Irizarry did not actually tell them to Mr. Garris as well.

So I find by a preponderance of the evidence that Mr. Irizarry did in fact intend and does have a current intent, if he is able to, to carry out these threats. And so I think the six-point enhancement is appropriate and I so find.

And I understand your objection to it. I also find [67] that, based upon the statements that he made to Mr. Garris – and I don't think a time window is relevant. He could have made those statements two days after he was arrested and/or he could have made them yesterday, and they would still evidence that he was not accepting responsibility for what he did. When I say acceptance of responsibility, it could be at

any time after commission of the offense that he disavows acceptance of responsibility. It did not have to be after he told probation that he accepted responsibility and then disavowed it. He's making contrary statements all over the place. And I believe that he still intends to threaten and to terrorize Ms. Smith by whatever means he can and that he does not accept responsibility for what he has done. And so I don't think he is entitled to points off for acceptance of responsibility. And those are my findings on those two objections.

Now, having said that, it is the finding of the court that the total offense level in this case is 22 with a criminal history category of I. And other than the objections that you've already stated and which you have on the record, are there other objections to those findings?

MR. MADDEN: I think – the objections, and I think the proper standard of proof should have been beyond a reasonable doubt as to the six levels.

THE COURT: Well, given that – beyond a reasonable doubt as to the six levels? Do you think a jury should have [68] made those findings?

MR. MADDEN: Who knows anymore?

THE COURT: Well, given that the guidelines are only advisory anyway, I think the standard that I used is appropriate and was correct. But I understand your objection.

All right. Now, do you have anything that you'd like to say on behalf of Mr. Irizarry before I impose sentence?

MR. MADDEN: No. I think I already did that. I'm sure he's got some things he'd like to say.

THE DEFENDANT: Yeah.

THE COURT: All right, Mr. Irizarry. I'll hear from you.

THE DEFENDANT: Your Honor, I did not know these subjects were going to come up today, about the affidavits, and I don't feel – if that's the case, I would have had Laura come to court, my mom, Michael, and have them testify on behalf of Mrs. Smith. I don't feel that – I've been badgered. Those things are not proven in court. And as far as Mr. Garris goes, there was another bunkee in there who feared – Mr. Garris was always threatening to beat him up. He overheard a lot of things. I didn't have time to subpoena him. And I just feel that – I mean, where's the people to testify on my behalf? Before all these things happened, Mrs. Smith and her husband and Susie and those people, they also did other things. And you said that motive was not an issue, but yet you are taking [69] their hearsay, things that never were proven, into consideration.

THE COURT: All right. Do you have anything else you would like to say before I impose sentence?

THE DEFENDANT: No, Your Honor.

THE COURT: Mr. Butler, do you have anything to say?

MR. BUTLER: Your Honor, we would recommend that you impose a high-end of the guideline sentence. This is a defendant who engaged in behavior which is shocking. If you read the emails, they are in fact chilling. The emails were in fact a culmination of a long history of abuse suffered by the wife and the children at a period of time in their life when they were trying to get on with their lives in a new part of the country. They have been prevented from doing so to a large extent. We would ask that you take that into consideration. You've heard all the testimony. There's no sense in repeating it right now. But we ask that you impose a high-end sentence, which we believe is appropriate for punishment and deterrence for this particular defendant under the unique facts of this case. Thank you.

THE COURT: I've considered all of the evidence presented today, I've considered everything that's in the presentence report, and I've considered the statutory purpose of sentencing and the sentencing guideline range. I find the guideline range is not appropriate in this case. I find [70] Mr. Irizarry's conduct most disturbing. I am sincerely convinced that he will continue, as his ex-wife testified, in this conduct regardless of what this court does and regardless of what kind of supervision he's under. And based upon that, I find that the maximum time that he can be incapacitated is what is best for society, and

therefore the guideline range, I think, is not high enough.

The guideline range goes up to 51 months, which is only nine months shorter than the statutory maximum. But I think in Mr. Irizarry's case the statutory maximum is what's appropriate, and that's what I'm going to sentence him.

I'm now going to state the sentence, and after I've stated it, I will allow counsel the opportunity to make legal objections before imposition of the sentence.

It is the judgment of the Court that the defendant Richard Irizarry is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 60 months on count 13.

The Court recommends that he be imprisoned at an institution where mental health treatment is available.

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of three years on count 13.

Within 72 hours of release from custody of the Bureau of Prisons, the defendant shall report in person to the [71] probation office in the district to which he is released. While on supervised release, the defendant shall not commit any federal, state, or local crimes, he shall be prohibited from possessing a firearm or other dangerous device, and shall not possess a controlled substance. In addition, the defendant shall comply with the standard conditions

of supervised release as recommended by the United States Sentencing Commission and on record with this court.

The court orders that the defendant also comply with the following special conditions of supervised release: He shall participate in a mental health treatment program as directed by the probation office and, second, he is prohibited from initiating contact with his ex-wife or her husband or with his children.

In addition, he is also prohibited from being within the area where they are located; that is, in the physical area where they are located, where his children are in school, where his ex-wife or her husband work. And not only shall he not initiate contact, he shall not have anyone else initiate contact with them.

The Court finds that the defendant does not have the ability to pay a fine and therefore a fine is not imposed.

The Court finds that the recommended guideline range is inappropriate to the facts and circumstances of this case and therefore sentences above that range.

[72] The sentence imposed addresses the seriousness of the offense and the sentencing objectives of punishment, deterrence, and incapacitation.

It is ordered that the defendant pay a special assessment in the amount of $100 on count 13, which shall be due immediately.

Now, having stated the sentence I intend to impose, are there any legal objections to it?

MR. BUTLER: No objections from the United States.

MR. MADDEN: Yes. I'd reiterate the objections I previously made on the six-level enhancement for conduct evidencing – and the removal of the acceptance of responsibility reduction in sentencing range.

I'd also state that the sentence constitutes an upward departure from what the court found to be the applicable guideline range. We didn't have notice of its intent to upwardly depart. What the law is on that now with –

THE COURT: I think the law on that is out the window.

MR. MADDEN: – I don't know. But for purposes –

THE COURT: You had notice that the guidelines were only advisory and the court could sentence anywhere within the statutory range as defined by the United States Code statute.

MR. MADDEN: I object to failure to give notice of the court's intention to upwardly depart, failure to require proof beyond a reasonable doubt as the burden of proof for the [73] six-level enhancement, and also for the departure which the government didn't

ask for and which the Court imposed on its own motion. And I believe that's it.

THE COURT: All right. I note your objections, but I hereby impose the sentence as previously stated.

Mr. Irizarry, you can appeal your conviction if you believe that your guilty plea was somehow unlawful or involuntary or if there is some other fundamental defect in the proceeding that was not waived by your guilty plea. You also have a statutory right to appeal the sentence itself under certain circumstances. If you do decide to appeal, you must do so within 10 days of entry of judgment in this case and Mr. Madden can file that notice for you.

MR. MADDEN: Let me state on the record it is his intention to appeal.

THE COURT: All right.

THE CLERK: Your Honor, counts –

THE COURT: You must file notice within 10 days of entry of judgement.

THE CLERK: Your Honor, counts one through 12, 14 and 15 are still pending.

THE COURT: I believe that there are – yes, counts one through 12, 14 and 15 are due to be dismissed. MR. BUTLER: Yes, Your Honor. We move.

THE COURT: They will be dismissed.

[74] MR. BUTLER: Thank you.

THE COURT: We're adjourned.

(This matter concluded at approximately 12 noon)

[75] CERTIFICATE

STATE OF ALABAMA)

COUNTY OF BALDWIN)

I do hereby certify that the above and foregoing transcript of proceedings in the matter aforementioned was taken down by me in machine shorthand and reduced to writing under my personal supervision, and that the foregoing represents a true and correct transcript of the proceedings of said hearing.

I further certify that I am neither of counsel nor of kin to the parties to the action, nor am I in anywise interested in the result of said cause.

/s/ Roy Isbell 4-29-05
ROY ISBELL, CSR, RPR, RMR, RDR, CRR COURT REPORTER, NOTARY PUBLIC STATE OF ALABAMA AT LARGE

My Commission Expires: 10/2/2005

Certified Shorthand Reporter
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Certified Realtime Reporter
National Court Reporters Association

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA

UNITED STATES OF AMERICA	**JUDGMENT IN A CRIMINAL CASE**
V.	(For Offenses Committed On or After November 1, 1987)
RICHARD IRIZARRY, a/k/a Richard Israel Irizarry	CASE NUMBER: **1:03-CR-00236-001**
	USM NUMBER: **89534-198**
	Arthur J. Madden, III, Esquire **Defendant's Attorney**

THE DEFENDANT:

(X) pleaded guilty to count(s) 13 of the Superseding Indictment on 11/22/2004.

( ) pleaded nolo contendere to count(s) _____ which was accepted by the court.

( ) was found guilty on counts(s) _____ after a plea of not guilty.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count No.(s)
18 USC § 875(c)	Threatening interstate communications.	11/5/2003	13

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence

is imposed pursuant to the Sentencing Reform Act of 1984.

( ) The defendant has been found not guilty on count(s)__

(X) Counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14 & 15 are dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of material change in the defendant's economic circumstances.

March 17, 2005
Date of Imposition of Judgment

/s/ Callie V. S. Granade
CHIEF UNITED STATES
DISTRICT JUDGE

March 22, 2005
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total **term** of **SIXTY (60) MONTHS on Count 13 of the Superseding Indictment**.

(X) The court makes the following recommendations to the Bureau of Prisons:

that the defendant be imprisoned at an institution where mental health treatment is available.

(X) The defendant is remanded to the custody of the United States Marshal.

( ) The defendant shall surrender to the United States Marshal for this district:

( ) at _____ a.m./p.m. on _____.

( ) as notified by the United States Marshal.

( ) The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

( ) before 2 p.m. on _____.

( ) as notified by the United States Marshal.

( ) as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____ with a certified copy of this judgment.

UNITED STATES MARSHAL

By: _____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **3 years**.

(X) ***Special Conditions*: 1) the defendant shall participate in a program of mental health treatment and/or counseling as directed by the Probation Office; and 2) the defendant is prohibited from initiating contact, or having anyone else initiate contact, with his ex-wife or her husband, or their children. In addition, he is also prohibited from being within the area where they are located (that is, the physical area where they are located, where his children are in school, and where his ex-wife or husband work).**

***For offenses committed on or after September 13, 1994*:** The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

( ) The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable)

( ) The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable)

( ) The defendant shall participate in an approved program for domestic violence. (Check, if applicable)

(X) The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment. The defendant shall report to the probation office in that district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not illegally possess a controlled substance.

The defendant shall comply with the standard conditions that have been adopted by this court (Probation Form 7a).

The defendant shall also comply with the additional conditions on the *attached page* (if applicable).

SUPERVISED RELEASE

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within he first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement;

14) the defendant shall cooperate, as directed by the probation officer, in the collection of DNA, if applicable, under the provisions of 18 U.S.C. §§ 3563(a)(9) and 3583(d) for those defendants convicted of qualifying offenses.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	**$100.00**		

( ) The determination of restitution is deferred until ___. An Amended Judgment in a Criminal Case (AO 245C) will be entered after such determination.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment, unless specified otherwise in the priority order or percentage payment column below. ***(or see attached)*** However, pursuant to 18 U.S.C. § 3664(i), all non-federal victims must be paid in full prior to the United States receiving payment.

( ) The defendant shall make restitution to the following payees in the amounts listed below.

Name(s) and Address(es) of Payee(s)	*Total Amount of Loss	Amount of Restitution Ordered	Priority Order or % of Payment
TOTALS:	$_____	$_____	

*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.**

( ) If applicable, restitution amount ordered pursuant to plea agreement. **$**

( ) The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default, pursuant to 18 U.S.C. § 3612(g).

( ) The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

( ) The interest requirement is waived for the ( ) fine and/or ( ) restitution.

( ) The interest requirement for the ( ) fine and/or ( ) restitution is modified as follows:

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A (X) Lump sum payment of $100.00 due immediately, balance due

( ) not later than _____ , or ( ) in accordance ( ) C, ( ) D, ( ) E, or ( ) F below; or

B ( ) Payment to begin immediately (may be combined with ( ) C, ( ) D, ( ) E, or ( ) F below); or

C ( ) Payment in _____ (e.g., equal weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ( ) Payment in _____ (e.g., equal, weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ( ) Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after Release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to ay at that time; or

F ( ) Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program are to be made to the clerk of court, unless otherwise directed by the court, the probation officer, or the United States attorney.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

( ) **Joint** and Several:

( ) The defendant shall pay the cost of prosecution.

( ) The defendant shall pay the following court cost(s):

( ) The defendant shall **forfeit** the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment; (2) restitution principal; (3) restitution interest, (4) fine principal; (5) community restitution, (6) fine interest (7) penalties, and (8) costs, including cost of prosecution and court costs.

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458 F.3d 1208

United States Court of Appeals, Eleventh Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
Richard IRIZARRY, Defendant-Appellant.
No. 05-11718.

Aug. 1, 2006.

Arthur J. Madden, III (Court-Appointed), Madden & Soto, Mobile, AL, for Defendant-Appellant.

David Andrew Sigler, Mobile, AL, for Plaintiff-Appellee.

Appeal from the United States District Court for the Southern District of Alabama.

Before EDMONDSON, Chief Judge, KRAVITCH, Circuit Judge, and MIDDLEBROOKS*, District Judge.

PER CURIAM:

Defendant Richard Irizarry plead guilty to making a threatening interstate communication to his ex-wife in violation of 18 U.S.C. section 875(c). The district court issued a sentence nine months longer than the advisory guidelines range because of the likelihood Defendant would continue to threaten his wife. Defendant appeals this sentence, arguing that the district court violated Rule 32(h) of the Federal

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* Honorable Donald M. Middlebrooks, United States District Judge for the Southern District of Florida, sitting by designation.

Rules of Criminal Procedure by not giving advance notice that it was considering a ground for departure not identified in the presentence report or a prehearing government submission. The district court concluded that Rule 32(h) was not applicable under the circumstances. We affirm.

I. Background

In 2003, Defendant was indicted with one count of making a threatening interstate communication in violation of 18 U.S.C. section 875(c). In 2004, a superseding indictment charged Defendant with fifteen counts of this offense. Without benefit of a plea agreement, Defendant filed a factual resume that admitted these things: (1) Defendant sent the e-mail charged in Count Thirteen of the superseding indictment to his ex-wife, Leah Smith, threatening to kill her and her new husband; (2) Defendant had "sent dozens of other similar e-mails" since his divorce from Ms. Smith in 2001 in violation of a restraining order; (3) the e-mails were "intended by [Defendant] to convey true threats to kill or injure multiple persons;" and (4) Defendant "at all times relevant during the commission of this crime . . . acted knowingly and willfully." On motion of the United States, the district court dismissed the remaining counts.

At the sentencing hearing, Ms. Smith testified that she married Defendant in 1995, that they had two children, and that Defendant physically and mentally abused Ms. Smith and her son during the

marriage. In 2000, Ms. Smith moved from California to South Carolina, where she obtained a divorce and a restraining order in 2001. Defendant drove cross-country and tracked down Ms. Smith's apartment; his van contained a hammer, rope, tarps, and duct tape. Defendant was arrested and jailed for 30 days for violating the restraining order. Ms. Smith moved to Mobile, Alabama.

Between the divorce in 2001 and Defendant's arrest in December 2003, Defendant sent Ms. Smith 255 e-mails, many of which threatened to kill Ms. Smith, her husband, and her mother. Ms. Smith became especially concerned about the safety of her mother, who lived in the same city as Defendant. Ms. Smith contacted the FBI and began forwarding Defendant's e-mails to FBI agents.

In 2003, Defendant called Ms. Smith at her new home and sent Ms. Smith's husband a Christmas card with a Mobile postmark. When Defendant was taken into custody in December 2003, his automobile contained a list of private investigators in Mobile; a print-out from an internet search service showing that a profile of Ms. Smith was available; maps of the Mobile area with notes about the location of Ms. Smith, her children's schools, and her husband's workplace; and cost estimates for travel to Mobile. During an interview with FBI agents following his arrest, Defendant threatened to shoot, car bomb, or decapitate Ms. Smith and her family and to "leave a trail of blood from here to Alabama" to protect his kids. Defendant's cellmate testified that Defendant

told him that Ms. Smith's husband was abusing Defendant's children and that Defendant intended to kill or hire someone to kill Ms. Smith's husband. Defendant testified at the sentencing hearing, denying that he intended to carry out his threats against Ms. Smith and her family.

The presentence investigation report recommended two, two-level sentence enhancements because Defendant's offense violated a court protection order and involved more than two threats and, also, one six-level enhancement because the offense involved "conduct evidencing an intent to carry out such threat." *See* U.S.S.G. § 2A6.1(b)(1)-(3). Defendant objected to the six-level enhancement, arguing that it was error for the district court to base a sentence enhancement on facts found using a preponderance of the evidence standard. The district court overruled the objection and applied all three sentence enhancements, leading to an advisory guidelines range of 41 to 51 months. The district court then sentenced Defendant to the statutory maximum of 60 months' imprisonment, three years' supervised release, and a $100 special assessment. The court gave the following reasons for its sentence:

> I've considered all of the evidence presented today, I've considered everything that's in the presentence report, and I've considered the statutory purpose of sentencing and the sentencing guideline range. I find the guideline range is not appropriate in this case. I find Mr. Irizarry's conduct most disturbing. I

> am sincerely convinced that *he will continue*, as his ex-wife testified, *in this conduct* regardless of what this Court does and regardless of what kind of supervision he's under. And based upon that, I find that *the maximum time that he can be incapacitated is what is best for society*, and therefore the guideline range, I think, is not high enough.
>
> The guideline range goes up to 51 months, which is only nine months shorter than the statutory maximum. But I think in Mr. Irizarry's case the statutory maximum is what's appropriate, and that's what I'm going to sentence him.

(R.69 at 69-70.) (emphasis added).

Defendant objected that the court had not given advance notice of its intent to depart upward from the sentencing guidelines as required by Rule 32(h). The district court overruled this objection, saying it believed Rule 32(h) was no longer applicable because Defendant "had notice that the guidelines were only advisory and the Court could sentence anywhere within the statutory range as defined by the United States Code statute." The sentencing court did not say that it was engaged in an upward departure under the guidelines. Defendant now appeals his sentence, arguing that the district court violated Rule 32(h) and *Burns v. United States*, 501 U.S. 129, 111 S.Ct. 2182, 2187, 115 L.Ed.2d 123 (1991), by failing to

give advance notice of the grounds on which the court was considering an upward departure.[1]

II. Discussion

Federal Rule of Criminal Procedure 32(h) provides:

> Before the court may depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure.

Rule 32(h) codified the Supreme Court's statement in Burns that "before a district court can depart upward on a ground not identified as a ground for upward departure either in the presentence report or in a prehearing submission by the Government, Rule 32 requires that the district court give the parties reasonable notice that it is contemplating such a ruling."

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[1] Defendant also argues on appeal that the district court erred by applying a sentence enhancement based on facts that were neither admitted by Defendant nor found beyond a reasonable doubt. This claim is without merit. *See United States v. Chau*, 426 F.3d 1318, 1323-24 (11th Cir.2005) (if district court applies guidelines as advisory, *Booker* does not prohibit court from making additional factual findings, under preponderance-of-the-evidence standard, that go beyond defendant's admissions).

111 S.Ct. at 2187. The Court in Burns concluded that advance notice was required to ensure "full adversary testing of the issues relevant to a Guidelines sentence" and to fulfill Rule 32's requirement that the parties have "an opportunity to comment upon . . . matters relating to the appropriate sentence." *Id.* at 2186.

We conclude that the above-guidelines sentence imposed by the district court in this case was a variance, not a guidelines departure. The district court correctly calculated the advisory guidelines range. The court then considered the adequacy of this range in the light of the sentencing factors listed in 18 U.S.C. section 3553(a) and the evidence presented at the sentencing hearing.[2] After concluding that the guidelines range did not adequately address

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[2] In determining the sentence to be imposed, section 3553(a) requires the district court to consider the following factors:

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (3) the need for deterrence; (4) *the need "to protect the public from further crimes of the defendant*;" (5) the need to provide the defendant with educational or vocational training or medical care; (6) the kinds of sentences available; (7) the sentencing guidelines range; (8) pertinent policy statements of the Sentencing Commission; (9) the need to avoid unwarranted sentencing disparities; and (10) the need to provide restitution to victims. 18 U.S.C. § 3553(a) (emphasis added).

the future risk Defendant posed to the public, *see* 18 U.S.C. section 3553(a)(2)(C), the court exercised its post-*Booker* discretion to impose a reasonable sentence outside the sentencing guidelines range. *See United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 757, 160 L.Ed.2d 621 (2005).

We have not previously determined whether the notice requirement of Rule 32(h) applies to a sentence set outside the advisory guidelines range based not on the guidelines' departure provisions, but on a district court's consideration of the section 3553(a) factors.[3] We now join the Third, Seventh, and Eighth Circuits in concluding Rule 32(h) does not apply to such variances. *See United States v. Vampire Nation*, 451 F.3d 189, 196-97 (3d Cir.2006); *United States v. Walker*, 447 F.3d 999, 1007 (7th Cir.2006); *United States v. Long Soldier*, 431 F.3d 1120, 1122 (8th Cir.2005).[4] After *Booker*, parties are inherently on

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[3] In *United States v. Simmerer*, 156 Fed.Appx. 124, 128 (11th Cir.2005), we concluded it was not plain error for a district court to give no advance notice that it was considering a sentence above the guidelines range because there was "no precedent from this court or from the Supreme Court establishing that [Rule] 32 applies to a post-*Booker* upward variance." *Accord United States v. Reddick*, 2006 WL 1683461 at *5 (11th Cir. June 20, 2006).

[4] We accept that at least two other circuits have reached the contrary conclusion. *See United States v. Davenport*, 445 F.3d 366 (4th Cir.2006); *United States v. Evans-Martinez*, 448 F.3d 1163 (9th Cir.2006). *Cf. United States v. Calzada-Maravillas*, 443 F.3d 1301, 1305 (10th Cir.2006) (deciding that Rule 32(h)

(Continued on following page)

notice that the sentencing guidelines range is advisory and that the district court must consider the factors expressly set out in section 3553(a) when selecting a reasonable sentence between the statutory minimum and maximum. *See United States v. Talley*, 431 F.3d 784, 786 (11th Cir.2005). Given *Booker*, parties cannot claim unfair surprise or inability to present informed comment – the Supreme Court's concerns in *Burns* – when a district court imposes a sentence above the guidelines range based on the section 3553(a) sentencing factors.

We conclude that the district court was not required to give Defendant advance notice before imposing a sentence above the advisory guidelines range based on the court's determination that sentences within the advisory guidelines range did not adequately address section 3553(a) sentencing factors, particularly the need to protect the public, including Defendant's ex-wife, from further crimes of the Defendant.

The sentence imposed by the district court is AFFIRMED.

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continues to apply to guidelines departures post-*Booker*, but not deciding whether notice is required before a sentence variance).

Supreme Court of the United States
Richard IRIZARRY, petitioner,
v.
UNITED STATES.

No. 06-7517.

Jan. 4, 2008.

Motion of petitioner for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit granted. Brief of petitioner to be filed on or before Thursday, February 14, 2008. Brief of Respondent to be filed on or before Wednesday, March 12, 2008. Reply brief, if any, to be filed in accordance with Rule 25.3 of the Rules of this Court.

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No. 06-7617

IN THE

Supreme Court of the United States

RICHARD IRIZARRY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

As the United States recognizes, the sound administration of federal criminal sentencing warrants a requirement that district courts provide parties with reasonable notice before *sua sponte* imposing a non-guideline sentence on previously undisclosed grounds. The government agrees that the text of Rule 32(h) and Rule 32(i)(1)(C) of the Federal Rule of Criminal Procedure, as well as the purposes of the rule, support the conclusion that reasonable notice is required here. Further, as this Court concluded in *Burns v. United States*, 501 U.S. 129 (1991), the due process guarantee at the center of the adversarial process supports a notice requirement.

Burns recognized that when a district court imposes a non-guideline sentence on a ground not previously identified, it risks predicating its sentence on inaccurate assumptions about the relevant facts and sentencing considerations. That is what happened in this case, where Mr. Irizarry received an above-guideline term of imprisonment based in significant part on untested and questionable assumptions about his mental condition. His sentence should be vacated and the case remanded.

I. THE DISTRICT COURT ERRED IN FAILING TO PROVIDE NOTICE OF THE CONTEMPLATED GROUNDS FOR IMPOSING A SENTENCE OUTSIDE THE GUIDELINE RANGE

Rule 32(h) and Rule 32(i)(1)(C) provide independent textual bases for the requirement that district courts provide notice before imposing any non-guideline sentence. Reasonable notice would advance the purposes of Rule 32 by ensuring full and fair adversarial testing of the contemplated grounds for the sentence. Avoiding a serious due process question is an additional reason to construe Rule 32 to require reasonable notice.

The arguments of amicus curiae defending the judgment below are unpersuasive. A requirement of reasonable notice would neither impose administrative burdens on district courts nor deter them from entering sentences at variance with the guideline range. Amicus's contention that sentences based on the Section 3553(a) factors are pure exercises in judgment, divorced from questions of fact, does not withstand scrutiny. And the advisory committee's decision to postpone consideration of an amendment to Rule 32(h) is irrelevant.

A. The Notice Requirement Of Rule 32 Applies To All Non-Guideline Sentences

1. Amicus contends (Amicus Br. 19-20) that Rule 32(h) has no application to non-guideline sentences based on the Section 3553(a) factors because the text of the rule uses the words "depart"

and "departure." Even before *United States v. Booker*, 543 U.S. 220 (2005), however, the Guidelines generally defined "departure" as the "imposition of a sentence outside the applicable guideline range or of a sentence that is otherwise different from the guideline sentence." U.S.S.G. § 1B1.1, cmt. n.1(E); *see also* U.S.S.G. ch. 1, pt. A4(b) (1991). Because a variance based on the Section 3553(a) factors qualifies as "a sentence outside the applicable guideline range," it comfortably fits within that definition of "departure." *Accord* Webster's Third New International Dictionary of the English Language 604 (1993) (defining "departure" as a "deviation or divergence esp. from a rule, course of action, plan, or purpose").

Nevertheless, according to amicus, the term "departure" has "a precise legal meaning" that refers exclusively to non-guideline sentences based on § 4A1.3 and parts H and K of chapter 5 of the Sentencing Guidelines. Amicus Br. 19-20 (quoting *United States v. Vega-Santiago*, No. 06-1558, 2008 WL 451813, at *1 (1st Cir. Feb. 21, 2008) (en banc)). Neither amicus nor the *Vega-Santiago* court, however, has identified any authority that ascribes that "precise legal meaning" to the term. *See* Amicus Br. 21; *Vega-Santiago*, 2008 WL 451813, at *1. To the contrary, this Court and nearly every court of appeals—including the court below—have used the word "departure" to describe non-guideline sentences based on the Section 3553(a) factors. *See, e.g., Rita v. United States*, 127 S. Ct. 2456, 2464 (2007) ("The sentencing courts, applying the Guidelines in individual

cases may *depart* (either pursuant to the Guidelines or, since *Booker*, by imposing a non-Guidelines sentence).") (emphasis added); *Gall v. United States*, 128 S. Ct. 586, 594, 595 (2007); *United States v. Martin*, 455 F.3d 1227, 1236 (11th Cir. 2006) ("[W]e review any *Booker*-based *departures* outside that range for reasonableness in light of the § 3553(a) factors and the reasons stated by the district court for *departing*.") (emphasis added).[1]

2. Amicus maintains that Rule 32(i)(1)(C) has no application here because the parties now have a "settled . . . expectation[]" that a district court may impose a non-guideline sentence "[e]ven in a completely typical case." Amicus Br. 27. In *Burns*, the Court held that a notice requirement is implicit in the provision now codified as Rule 32(i)(1)(C), which guarantees both parties an opportunity "to comment on the probation officer's

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[1] *See, e.g., United States v. Calzada-Maravillas*, 443 F.3d 1301, 1304 (10th Cir. 2006) (distinguishing between "guideline departure[s]" and "non-guideline departure[s]"); *United States v. McBride*, 434 F.3d 470, 476 n.5 (6th Cir. 2006) ("It is perhaps helpful to think of Chapter 5 departures . . . as Guideline departures. In turn, sentences lower than the Guidelines recommendation based on section 3553(a) factors can be thought of as Non-Guideline departures . . . ."); *United States v. Lane*, 509 F.3d 771, 775-76 (6th Cir. 2007); *United States v. Santiago*, 495 F.3d 820, 825 (7th Cir. 2007); *United States v. Walters*, 490 F.3d 371, 372, 374 (5th Cir. 2007); *United States v. Smith*, 472 F.3d 222, 224-25 (4th Cir. 2006); *United States v. Hawk Wing*, 433 F.3d 622, 625 (8th Cir. 2006).

determinations and other matters relating to an appropriate sentence." *See Burns*, 501 U.S. at 132. If anything, *Booker* makes it even *more* difficult to "guess when or on what grounds" a district court might sentence outside the guideline range, reinforcing the need for reasonable notice to allow the parties "to 'comment' on such a possibility in a coherent way." *Burns*, 501 U.S. at 136-37. Because the broad factors described in Section 3553(a), like the Guidelines, "place essentially no limit on the number of potential factors that may warrant" a non-guideline sentence, *id.* at 136, the reasoning of *Burns* applies with equal, if not greater, force to non-guideline sentences based on Section 3553(a). *See Rita*, 127 S. Ct. at 2465 (citing Rule 32(h), Rule 32(i)(1)(C), and *Burns* for the proposition that "the sentencing court subjects the defendant's sentence to the thorough adversarial testing contemplated by federal sentencing procedure," even for sentences reviewed for reasonableness on appeal after *Booker*).

3. Amicus also contends (Amicus Br. 47-53) that a district court's decision to impose an above-guideline sentence without prior notice to the defendant presents no serious due process question. That contention underestimates the strength of the due process interests at stake.

Although the Court in *Burns* did not elaborate on the constitutional question it sought to avoid, 501 U.S. at 138, the parties and the dissent approached the issue using the balancing test of *Mathews v. Eldridge*, 424 U.S. 319 (1976). *See id.* at 147 (Souter, J., dissenting). Under that framework, there remains a serious constitutional

question whether a district court may *sua sponte* impose an above-guideline sentence without notice to a criminal defendant. As this Court recognized in *Townsend v. Burke*, 334 U.S. 736, 741 (1948), due process protects a defendant's liberty interest in the length of a sentence and prohibits sentences that are predicated on "misinformation." A district court's *sua sponte* deviation from the guideline range poses a serious risk of deprivation by leaving "critical sentencing determination[s]" relevant to that decision "untested." *Burns*, 501 U.S. at 137. Reasonable notice of the contemplated grounds, by contrast, safeguards the defendant's interest because it affords the defendant a full and fair opportunity to challenge the factual and legal basis for the court's action. *Id.* The government's interest does not outweigh those considerations. As the United States vigorously argues, the prosecution has a corresponding interest in reasonable notice and accuracy, and any burden on the courts is minimal. Gov't Br. 26-28, 32-34; *see infra* 8-11.

Amicus suggests (Amicus Br. 50-51) that *Booker* has undercut a defendant's due process interest in a guideline sentence. It is true that, in the wake of *Booker*, a defendant no longer has an entitlement to a guideline sentence "in the absence of grounds defined by the Act as justifying departure." *Burns*, 501 U.S. at 147 (Souter, J., dissenting). Yet the Guidelines continue to serve as "the starting point and the initial benchmark" for every sentence, and the court must offer a sufficient justification for a decision to sentence outside the guideline range. *Gall*, 128 S. Ct. at 596-

97. The Court in *Rita* emphasized the continuing "importance of notice and meaningful opportunity to be heard at sentencing" after *Booker*. 127 S. Ct. at 2465. Thus, as in *Burns*, the avoidance of a serious constitutional question provides an additional reason to construe Rule 32 to provide reasonable notice.[2]

Amicus also argues that *Medina v. California*, 505 U.S. 437, 446 (1992), rather than *Mathews*, governs the due process inquiry. Neither the context nor the logic of *Medina*, however, extends to these circumstances. In *Medina*, the Court declined to apply *Mathews* to state-court trial proceedings because "[t]he Bill of Rights speaks in explicit terms to many aspects of criminal procedure," and the Due Process Clause does not "'establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure.'" 505 U.S. at 443 (quoting *Spencer v. Texas*, 385 U.S. 554, 564 (1967)). The Bill of Rights is

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[2] Amicus also contends that the canon of constitutional doubt has no application here because Rule 32 is unambiguous. Amicus Br. 47 (citing *Miller v. French*, 530 U.S. 327, 341 (2000)). That argument is foreclosed by *Burns*, which found a sufficient textual basis for a notice requirement in Rule 32(i)(1)(C) and applied the avoidance canon so as not to "confront the serious question whether notice in this setting is mandated by the Due Process Clause." 501 U.S. at 138 (citing *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)). Since that decision, Rule 32 has gained a second textual hook: the express requirement of reasonable notice for "departures" in Rule 32(h).

silent, however, on post-trial proceedings like criminal sentencing. In the absence of such "explicit [constitutional] terms," the background due process analysis of *Mathews* remains applicable. *See id.* at 454-55 (O'Connor, J., concurring) (deeming the *Mathews* test appropriate "in the context of modern administrative procedures," including "the new administrative regime established by the federal criminal sentencing guidelines"); *Burns*, 501 U.S. at 147 (Souter, J., dissenting). Further, because *Medina* rested on state legislatures' "considerable expertise in matters of criminal procedure," 505 U.S. at 445-46, it has never been extended to federal-court proceedings. *See United States v. Wise*, 976 F.2d 393, 412 n.4 (8th Cir. 1992) ("The Court's reasoning [in *Medina*] draws heavily on considerations of federalism, and it seems that *Mathews* is still generally applicable under the Due Process Clause of the Fifth Amendment.") (citation omitted).

B. The Remaining Arguments Of Amicus Lack Merit

Amicus advances three additional arguments to defend the decision below. None of these rationales was relied upon by the court of appeals (J.A. 399-400), and none is convincing.

1.a. Amicus mistakenly argues (Amicus Br. 28-36) that a requirement of reasonable notice would be "burdensome" for administrative reasons. In *Burns*, however, this Court recognized that it is only "the extraordinary case" in which the district court departs "on its own initiative and contrary to the expectations of both the de-

fendant and the Government." 501 U.S. at 135. After *Booker*, *sua sponte* non-guideline sentences remain rare. The Sentencing Commission's final quarterly report for fiscal year 2007 reveals that out of 51,997 sentences, only 9,493 (18.3%) fell outside the guideline range. Even fewer (6,604 sentences, or 12.7%) identified *Booker* or Section 3553(a) as a basis for sentencing outside the guideline range.[3] And in the overwhelming majority of those cases, the ground for the non-guideline sentence was specifically identified in the presentence report (PSR) or by the parties. Gov't Br. 32. It is only "the extraordinary case" in which the district court surprises the parties by sentencing outside the guideline range on previously undisclosed grounds. *Vega-Santiago*, 2008 WL 451813, at *11 (Lipez, J., dissenting) (concerns "that an advance notice rule would often require a two-stage sentencing process" are "at odds with reality").

Moreover, even under the construction adopted by the court of appeals (*see* J.A. 398-99), Rule 32 compels district court judges to determine before sentencing whether the PSR or a party's submission recommends a departure under the Guidelines. *See* Fed. R. Crim. P. 32(h). If none has been suggested, but the district court nonetheless believes a Guidelines departure may be warranted, the court is obligated to provide reasonable notice to the parties "specify[ing] any ground on which the court is contemplating a de-

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[3] *See* App., *infra*, 1a. All figures exclude government-sponsored below-range sentences. *Id.* n.*.

parture." *Id.* There is no reason to believe that the *marginal* burden of considering possible grounds for a non-guideline sentence under Section 3553(a) at the same time would prove unworkable.[4]

Amicus poses a series of rhetorical questions designed to show that a reasonable-notice requirement would be unworkable. *See* Amicus Br. 31-32 (questioning the timing of the required notice, the "amount" and specificity of notice, district courts' willingness to fully explain their decisions, and the length of a necessary continuance). But identical questions about the timing and content of "reasonable notice" arose under *Burns*. *See Burns*, 501 U.S. at 139 n.6 ("Because the question of the *timing* of the reasonable notice required by Rule 32 is not before us, we express no opinion on that issue."). Those concerns were no obstacle to the recognition of a notice requirement in that case, and they should not assume any greater importance here. In addition, courts of appeals that require reasonable notice for all non-guideline sentences already have begun to address those

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[4] For the same reason, the contention that a reasonable notice requirement will transform the Crime Victim's Rights Act (CVRA) "into a procedural nightmare" (Amicus Br. 33) cannot be credited. Victim impact testimony may identify grounds for Guidelines departures as well as reasons for *Booker* variances. Amicus offers no evidence that Rule 32 has rendered the CVRA "an empty exercise" anywhere, let alone that the effect has been more pronounced in circuits in which the notice requirement applies to variances. *See* Amicus Br. 34.

questions.[5] Amicus points to no evidence of widespread continuances, a breakdown in appellate review, or other dire consequences in those circuits.

b. Amicus argues that a notice requirement would be "problematic" under the Sixth Amendment because it "risks creating an excessive 'gravitational pull' back toward the Guidelines." Amicus Br. 29 (quoting *Rita*, 127 S. Ct. at 2487 (Souter, J., dissenting)). In amicus's view, district courts eager to avoid the "practical costs" of providing reasonable notice will impose within-guideline sentences even in cases where the Section 3553(a) factors justify an out-of-guideline sentence. *Id.* That contention begins from the faulty premise that district court judges would prefer to impose the wrong sentence rather than bear the "modest burden of preparing a brief no-

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[5] *See United States v. Tate*, 516 F.3d 459, 468 (6th Cir. 2008) (notice need only identify factors that will "play[] [a] significant role in the imposition of [the] sentence"); *United States v. Vowell*, 516 F.3d 503, 515 (6th Cir. 2008) (timing of notice "is a context-specific question" that depends on the complexity of the issues and the availability of cumulative evidence on the relevant ground); *United States v. Blatstein*, 482 F.3d 725, 732 (4th Cir. 2007) (notice must enable the parties to "subject the *rationale* for the variance to the adversarial testing process contemplated by Rule 32") (emphasis added); *United States v. Anati*, 457 F.3d 233, 238 (2d Cir. 2006) (notice must "facilitate a defendant's opportunity to contest the *factual premises* of the sentencing judge's view" of the Section 3553(a) factors) (emphasis added).

tice." *Vega-Santiago*, 2008 WL 451813, at *12 (Lipez, J., dissenting). Federal judges do not suffer from such timidity. *Id.* ("It is inconceivable to me that, having given the Guidelines due consideration and finding them lacking, a judge would suppress the independent judgment required by the Supreme Court simply to avoid providing the parties with reasonable prehearing notice.").

In any event, amicus's "gravitational pull" claim is foreclosed by *Rita*. There, the Court saw nothing "problematic" in an appellate presumption of reasonableness for guideline sentences, even on the assumption that the presumption would "encourage sentencing judges to impose Guidelines sentences." *Rita*, 127 S. Ct. at 2467. So long as a procedural rule does not effectively require that the court find facts before imposing a sentence above the otherwise applicable maximum, it does not implicate the Sixth Amendment concerns identified in *Booker*. *See id.* at 2466; *id.* at 2476 (Scalia, J., concurring); *id.* at 2488 (Souter, J., dissenting).

2. Amicus also relies on a conceptual distinction that treats "variances" as pure exercises in judgment that are divorced from questions of fact. Amicus Br. 22-23 (citing Douglas A. Berman, *Conceptualizing* Booker, 38 Ariz. St. L.J. 387 (2006)). In the view of amicus, Guidelines departures "are justified on the basis of distinct facts," whereas "variances are justified on the basis of reasoned judgments *about* facts." *Id.* at 22. Reasonable notice should be limited to Guidelines departures, amicus argues, because such notice "is justified and administratively feasible" when con-

fined to "whatever case *facts* may seem atypical," but unworkable if extended to judgments. *Id.* at 25. For several reasons, that distinction does not withstand scrutiny.

First, *Booker* variances are almost always "justified on the basis of distinct facts" as well. In *Gall*, for example, the district court entered a below-guideline sentence in light of the Section 3553(a) factors. It expressly based that judgment on facts about the case: the defendant's voluntary withdrawal from the conspiracy, his admirable post-offense conduct, the support of his family and friends, and his age at the time of the offense conduct. 128 S. Ct. at 593. Although no factual finding is *necessary* before imposing a non-guideline sentence based on the Section 3553(a) factors, *see Booker*, 543 U.S. at 259, it is undeniable that facts—not just abstract judgments—typically serve as the basis for a *Booker* variance. *Gall*, 128 S. Ct. at 597 (the "individualized assessment" required under Section 3553(a) is "based on the facts presented").[6]

Second, the distinction drawn by amicus makes no sense for the many Guidelines departure grounds that can simply be recharacterized as grounds for a non-guideline sentence under

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[6] Amicus also mischaracterizes Guidelines departures, which require not only a finding of atypical facts, but a judgment that the atypical facts in a particular case should result in a non-guideline sentence. *See Koon v. United States*, 518 U.S. 81, 98 (1996) (a Guidelines departure "embodies the traditional exercise of discretion by a sentencing court").

Section 3553(a). The same atypical case facts that justify a Guidelines departure based on the inadequacy of the defendant's criminal history (U.S.S.G. § 4A1.3) or the defendant's extreme conduct (U.S.S.G. § 5K2.8), for example, can now justify an above-guideline sentence based on "the nature and circumstances of the offense and the history and characteristics of the defendant," 18 U.S.C. § 3553(a)(1). The overlap between the grounds for Guidelines departures and *Booker* variances is confirmed by the significant number of cases in which the district court cites *both* the Guidelines and *Booker* or Section 3553(a) as the basis for a non-guideline sentence, or specifies *neither* as the basis for its decision.[7] When the same ground could support a non-guideline sentence on either basis, the parties' entitlement to

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[7] Amicus denies (Amicus Br. 43 n.3) that district courts sometimes characterize their non-guideline sentences as *both* a Guidelines departure and a variance, and sometimes specify *neither* basis, *see* Pet. Br. 23, and faults petitioner for relying on preliminary data. But the final quarterly report, cited in amicus's brief, shows even more such sentences than the preliminary report: 1,156 sentences (12.2% of non-guideline sentences) in which the Court specified both bases, and 808 sentences (8.7% of non-guideline sentences) in which the Commission could not determine whether the sentence was a Guidelines departure or a variance. *See* App., *infra*, 1a. The figures were even higher in 2006. *See* U.S. Sentencing Commission, *2006 Sourcebook of Federal Sentencing Statistics*, Table N, *available at* http://www.ussc.gov/ANNRPT/2006/TableN.pdf (both bases specified in 1,609 sentences (16.7%), and neither basis specified in 1,014 sentences (10.5%)).

notice should not depend on how the district court chooses to characterize its decision.

Third, amicus's distinction between facts and judgment is irrelevant to the text and purpose of Rule 32. Rule 32(h) by its terms requires reasonable notice for any "departure," which the Guidelines define as a "sentence outside the applicable guideline range." U.S.S.G. § 1B1.1, cmt. n.1(E). Even if *Booker* variances were pure exercises in judgment, they would still fall within that definition. Similarly, Rule 32(i)(1)(C) grants parties a right to comment on all "matters relating to an appropriate sentence," and judgments that might lead to a non-guideline sentence certainly qualify as matters related to an appropriate sentence. Construing either provision to require reasonable notice would advance "Rule 32's purpose of promoting focused, adversarial resolution of the legal and factual issues." *Burns*, 501 U.S. at 137. Without such notice, as in *Burns*, parties would be forced either to "address possible *sua sponte* [variances] in a random and wasteful way by trying to anticipate and negate every conceivable ground" for sentencing outside the guideline range, or to "not even try to anticipate such a development," leaving "a critical sentencing determination . . . untested by the adversarial process contemplated by Rule 32." *Id.*

3. Amicus also claims that the Court should confine Rule 32(h) to Guidelines departures because the rulemaking process "has considered and rejected the very rule Petitioner seeks." Amicus Br. 17; *see id.* at 42-46. That claim misstates the rulemaking proceedings and draws an unwar-

ranted inference from the advisory committee's inaction.

As amicus observes (Amicus Br. 45), the Advisory Committee on Criminal Rules has considered an amendment to Rule 32(h) that would expressly require reasonable notice for non-guideline sentences based on the Section 3553(a) factors. Contrary to amicus's claim that the amendment has been "rejected," the advisory committee has appropriately elected to await guidance from this Court. The proposal was recently referred to a subcommittee for further study.[8] The committee's December 2007 report explained that although "[t]he Advisory Committee agreed that the proposal had sufficient merit to warrant further consideration, it has deferred consideration *due to developments in both the Supreme Court and the lower courts*."[9] It is no small irony that amicus asks this Court to defer to the rulemaking process even as the rulemakers defer to the courts.

In a highly one-sided account of the public comments and committee debate, amicus suggests (Amicus Br. 45) that the committee's inaction resulted from "vociferous" objections from federal judges. That distorted account illustrates why "failed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute." *United States v. Craft*,

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[8] Report of the Advisory Committee on Criminal Rules, Dec. 12, 2007, at 4, *available at* http://www.uscourts.gov/rules/Reports/CR12-2007.pdf.

[9] *Id.* (emphasis added).

535 U.S. 274, 287 (2002). Not only do the minutes and public comments reveal extensive supportive statements as well,[10] but the vote before the advisory committee reflected its belief that further study was needed to determine "whether either due process or the current text of Rule 32(h) require notice to be given if the court is considering non guideline sentencing factors that have not already been identified."[11] Some committee members also "expressed the view that this was an evolving area of the law that was not yet ripe for codification."[12] Because "several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change," *Central Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 187 (1994), the proposed amendment does not preclude this Court from properly construing Rule 32(h) and Rule 32(i)(1)(C) to impose a requirement of reasonable notice for *Booker* variances.

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[10] *See* Minutes of the Oct. 26-27, 2006 Meeting of the Advisory Committee on Criminal Rules at 4, *available at* http://www.uscourts.gov/rules/Minutes/CR-10-2006-min.pdf; 2005 Criminal Rules Comments Chart, http://www.uscourts.gov/rules/CR%20Rules%202005.htm.

[11] Report of the Advisory Committee on Criminal Rules, Dec. 18, 2006, at 2, *available at* http://www.uscourts.gov/rules/Reports/CR12-2006.pdf.

[12] *Id.*

II. THE DISTRICT COURT'S ERROR WARRANTS REMAND FOR A NEW SENTENCING HEARING

The government agrees that the district court erred in failing to provide reasonable notice of the contemplated grounds for its non-guideline sentence. It nonetheless asks this Court (Gov't Br. 37-48) to review the record and determine that the error was harmless. Consistent with its ordinary practice, the Court should remand to allow the court of appeals to consider that question in the first instance. If, however, the Court elects to conduct an independent review to reach the harmless-error question, it should find prejudice and remand the case for a new sentencing hearing.

A. This Court Should Remand To The Court Of Appeals

1. The government invites this Court (Gov't Br. 38-39) to conduct a plenary review of the record and determine in the first instance whether the notice error was prejudicial. Nothing about this case justifies that unusual action. The case instead should be remanded to the court of appeals.

This Court has repeatedly explained that its "normal practice where the court below has not yet passed on the harmlessness of any error" is to "remand th[e] case to the Court of Appeals" to consider whether the error was harmless "in the first instance." *Neder v. United States*, 527 U.S. 1, 25 (1999); *see, e.g.*, *Dobbs v. Zant*, 506 U.S. 357, 359 n.* (1993) (per curiam) ("[W]e see no reason to depart here from our normal practice of allowing

courts more familiar with a case to conduct their own harmless-error analyses."); *Carella v. California*, 491 U.S. 263, 266-67 (1989); *Pope v. Illinois*, 481 U.S. 497, 504 (1987); *Rose v. Clark*, 478 U.S. 570, 584 (1986); *California v. Green*, 399 U.S. 149, 169-70 (1970).

That practice follows from the Court's ordinary presumption that it "do[es] not decide in the first instance issues not decided below." *NCAA v. Smith*, 525 U.S. 459, 470 (1999). It also reflects the courts of appeals' relatively greater experience reviewing an entire district court record and applying harmless-error analysis. *Connecticut v. Johnson*, 460 U.S. 73, 102 (1983) (Powell, J., dissenting) (even when "this Court properly could decide the question of harmless error," it is "a question more appropriately left to the courts below" because "[t]here may be facts and circumstances not apparent from the record before us").

The government relies (Gov't Br. 38) on *United States v. Hasting*, 461 U.S. 499 (1983), for the proposition that the Court "plainly ha[s] the authority" to reach the harmless-error question. *Id.* at 510. But no one doubts the Court's authority to consider harmlessness; the Court's longstanding practice is to forego the *exercise* of that authority except in unusual circumstances. As the Court in *Hasting* emphasized, in the same sentence relied upon by the government, "we are not required to review records to evaluate a harmless error claim, *and do so sparingly*." *Id.* (emphasis added).

Traditionally, the Court has conducted its own review for harmlessness only in limited circum-

stances. First, the Court has conducted an independent harmless-error analysis where the court of appeals already passed on that question. *See Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993); *Yates v. Evatt*, 500 U.S. 391, 407 (1991); *Hasting*, 461 U.S. at 503-04; *Brown v. United States*, 411 U.S. 223, 231 (1973). Second, in some cases, the Court has granted certiorari precisely to decide the applicability of harmless-error review. *See Arizona v. Fulminante*, 499 U.S. 279, 284-85 (1991); *Satterwhite v. Texas*, 486 U.S. 249, 251 (1988); *United States v. Lane*, 474 U.S. 438, 439-40 (1986); *Harrington v. California*, 395 U.S. 250, 252 (1969); *Chapman v. California*, 386 U.S. 18, 20 (1967). Third, on occasion the Court has declined to reach the merits of a claim of error and *instead* has determined that the error, if any, was harmless. *See Milton v. Wainwright*, 407 U.S. 371, 372 (1972).

None of those circumstances exists here. The court of appeals found no error, and therefore has not yet considered the government's contention that the error was harmless. *See* J.A. 398-400. This Court granted certiorari to resolve a circuit conflict over whether reasonable notice was required for non-guideline sentences based on Section 3553(a), and the government makes no claim that the proper application of harmless-error review independently warrants this Court's attention. Nor has either party urged that the Court resolve the harmless-error issue instead of resolving the question presented.

2. The government notes that "[t]he parties have fully briefed the [harmlessness] issue," and

urges that the Court's independent assessment of the record in this case "would provide vital guidance to the lower courts." Gov't Br. 38. Those factors, however, do not distinguish this case from *Burns*, where the parties had fully briefed the harmless-error question, *see* Pet. Br. 37-42, *Burns v. United States*, No. 89-7260, *available at* 1990 WL 505507 (Aug. 13, 1990), but the Court conformed to its ordinary practice by remanding the case to the court of appeals. *See Burns*, 501 U.S. at 133. If anything, the need for guidance was *greater* in *Burns* because, in that case, lower courts had never before been called upon to assess whether a failure to provide notice was prejudicial. The government offers no reason to believe that "vital guidance" is now needed to assist lower courts in continuing to apply the same form of harmless-error analysis they have applied for seventeen years.

3. The existence of a separate question concerning the governing standard of harmless-error review is an additional reason to remand the case. Two courts of appeals have held that every violation of the rule announced in *Burns* implicates due process and is therefore subject to harmless-error review under the *Chapman* standard for constitutional error. *See United States v. Lopreato*, 83 F.3d 571, 577 (2d Cir.), *cert. denied*, 519 U.S. 871 (1996); *United States v. Paslay*, 971 F.2d 667, 674 (11th Cir. 1992). Two other courts of appeals have expressly reserved the question. *See Calzada-Maravillas*, 443 F.3d at 1307 n.3 (10th Cir. 2006); *United States v. Himler*, 355 F.3d 735, 743 (3d Cir. 2004). Those decisions demonstrate,

at a minimum, that a serious question exists as to the proper standard. Review by this Court is therefore unwarranted. *Cf. Tuggle v. Netherland*, 516 U.S. 10, 14 (1995) (where the lower court "did not consider whether, or by what procedures, the sentence might be sustained or reimposed" and did not "address[] whether harmless-error analysis is applicable to this case," remand was appropriate "[b]ecause this Court customarily does not address such an issue in the first instance").[13]

B. The Government Cannot Show That The Error Was Harmless

In the event that the Court chooses to resolve the harmless-error question, it should order a new sentencing hearing because the error was prejudicial regardless of the applicable standard of re-

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[13] The government maintains that a criminal defendant must preserve a "separate due process claim" to benefit from the *Chapman* standard, relying on Confrontation Clause decisions from the Second and Tenth Circuits. Gov't Br. 40 (citing *United States v. Dukagjini*, 326 F.3d 45, 59-60 (2d Cir. 2003); *United States v. Ramirez*, 479 F.3d 1229, 1246-47 (10th Cir. 2007)). The Second Circuit, however, has expressly rejected the requirement of a separate due process claim as a precondition to *Chapman* review in this context, *see Lopreato*, 83 F.3d at 577, and the Tenth Circuit has held the question open, *see Calzada-Maravillas*, 443 F.3d at 1307 n.3. If the Court were to conclude that the government has carried its burden under *Kotteakos*, but that it has failed to show harmlessness beyond a reasonable doubt under *Chapman*, then the Court would be forced to engage in a due process analysis that it otherwise could avoid.

view. *See United States v. Hernandez*, 476 F.3d 791, 801 (9th Cir. 2007), *cert. denied*, 128 S. Ct. 265 (2007) (declining to decide whether the error was constitutional in nature because under either standard the error was not harmless).

The district court's imposition of the statutory maximum sentence was predicated on the untested and questionable premise that Mr. Irizarry would continue to threaten his wife "regardless of what kind of supervision he's under." J.A. 374. Nothing in the PSR alerted defense counsel of the importance of the dispute over Mr. Irizarry's amenability to alternative forms of supervision, including psychiatric treatment. The record reveals substantial evidence, not brought to the attention of the court at sentencing, indicating that a guideline-range term of imprisonment followed by psychiatric treatment as a condition of supervised release would have been a sufficient sentence.

1. The standard articulated in *Kotteakos v. United States*, 328 U.S. 750, 776 (1946), "places the burden on prosecutors to explain why th[e] errors were harmless." *Brecht*, 507 U.S. at 640 (Stevens, J., concurring). The reviewing court must "evaluate the error in the context of the entire trial record." *Id.* at 641-42. If the court is left with "grave doubt" about the effect of the error, it may not treat the error as harmless. *Fry v. Pliler*, 127 S. Ct. 2321, 2328 n.3 (2007); *O'Neal v. McAninch*, 513 U.S. 432, 438-39 (1995).

The government principally contends (Gov't Br. 41-43) that the portion of the PSR discussing

a possible criminal-history departure under Sentencing Guidelines § 4A1.3 renders the notice error harmless. That contention is flawed because the PSR focused on Mr. Irizarry's criminal history, and the district court did not impose a non-guideline sentence on that basis.

The PSR calculated that Mr. Irizarry had zero criminal history points, resulting in a criminal history category of I. J.A. 410. In reaching that conclusion, however, the PSR discounted four prior adult offenses (three of them for driving with a suspended license) because they fell outside the applicable time limits, *see* U.S.S.G. § 4A1.2(e), and it discounted his prior conviction for violating the South Carolina restraining order because Mr. Irizarry was not represented by counsel, *see* U.S.S.G. § 4A1.2 Commentary Background. J.A. 408-10. The final paragraph of the PSR stated that "[p]ursuant to Guideline 4A1.3 (Adequacy of Criminal History Category), the Court may consider whether or not the defendant's criminal history category adequately reflects the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes." J.A. 417. In that event, the PSR stated, a departure under § 4A1.3 might be warranted. *Id.*

Seizing upon the reference to "the likelihood that the defendant will commit other crimes," the government argues (Gov't Br. 42) that the notice error in this case was harmless because Mr. Irizarry had "every incentive" to discuss his future dangerousness at sentencing. In context, however, the PSR refers only to Mr. Irizarry's past

criminal conduct as an indicator of future dangerousness. J.A. 417; U.S.S.G. § 4A1.3(a)(2) (enumerating particular conduct that may be underrepresented in a defendant's criminal history score, justifying an upward departure). That plainly was not the basis for the district court's sentence. The district court made no finding that Mr. Irizarry's criminal history category underrepresented his dangerousness; in fact, it expressly found that criminal history category I was appropriate. J.A. 372. Neither the court nor the parties invoked § 4A1.3 during sentencing. *See* J.A. 374-75; Gov't Br. 42 n.7.

Nor did the district court in effect ground its sentence on a judgment about Mr. Irizarry's criminal history. In explaining its reasons for sentencing above the guideline range, the court relied in substantial part on the likely effectiveness of alternative forms of punishment or supervision:

> I find the guideline range is not appropriate in this case. I find Mr. Irizarry's conduct most disturbing. I am sincerely convinced that he will continue, as his ex-wife testified, in this conduct *regardless of what this court does* and *regardless of what kind of supervision he's under*. And based upon that, I find that the maximum time that he can be incapacitated is what is best for society, and therefore the guideline range, I think, is not high enough.

J.A. 374-75 (emphasis added). That passage contains two distinct rationales: first, that Mr. Iri-

zarry would continue his "disturbing" threats against his ex-wife; and second, that no alternative "kind of supervision"—such as mandatory psychiatric treatment—could stop him. *See id.* at 374. The latter rationale depends on the likely success of treatment, and bears no connection to Mr. Irizarry's criminal history.

In hindsight, the district court's focus on the efficacy of supervised treatment makes perfect sense. A district court in its discretion may require, as a condition of supervised release, that the defendant "undergo available medical, psychiatric, or psychological treatment . . . as specified by the court, and remain in a specified institution if required for that purpose." 18 U.S.C. § 3563(b)(9); *see also id.* § 3583(d). Here, that course of action had been specifically recommended. *See* Federal Medical Center ("FMC") Report 14 (recommending that Mr. Irizarry receive "medication and mental health treatment on an outpatient basis" upon his release, but adding that "this would likely have to be required for him to adequately participate in treatment," and that "[a]t times he may require brief psychiatric hospitalizations as well"); J.A. 415 (PSR provision inviting the district court to consider a sentence committing Mr. Irizarry to continuing treatment at a suitable facility under 18 U.S.C. § 4244(d)).

Yet the district court gave no indication until the moment it announced its sentence that the supposed futility of treatment might justify a sentence above the guideline range. Neither the PSR nor a prehearing submission by the government identified that potential ground for deviation from

the guideline range.[14] As a result, the parties made no argument and did not introduce expert medical testimony concerning Mr. Irizarry's treatment options. Just as the Court in *Burns* warned, "a critical sentencing determination [has] go[ne] untested by the adversarial process contemplated by Rule 32." 501 U.S. at 137. Because Mr. Irizarry's prospects for treatment played a critical role in the district court's decision to sentence above the guideline range, and the PSR referred only to criminal history, the PSR does not assist the government in its effort to show that the failure to provide notice was harmless.[15]

2. For the same reasons, the government is mistaken in its contention (Gov't Br. 43-45) that the notice error was harmless because "future dangerousness" influenced several other contested issues at sentencing, including the victim-impact

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[14] Indeed, at the competency hearing, the district court specifically cut off testimony about the relationship between Mr. Irizarry's mental condition and "concern about the potential for dangerousness" and "third-party risk." J.A. 188-89.

[15] For the same reasons, the government is mistaken in its novel suggestion (Gov't Br. 42 n.7) that "there was no notice error at all" in this case. The government did not oppose certiorari on that basis, *see* Gov't Br. in Opp. 14, and it never pressed that claim before court of appeals. *See Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 39 (1989) (although the Court may consider any alternative ground for affirmance, "where the ground presented here has not been raised below we exercise this authority only in exceptional cases") (internal quotation marks omitted).

testimony, the denial of an adjustment for acceptance of responsibility, and the upward adjustment for intent to carry out the threats. The portions of the PSR and sentencing hearing that addressed those issues did not address the key question whether any form of supervision other than imprisonment would be effective.

The government's contention suffers from a more fundamental defect as well. A lack of reasonable notice cannot be automatically harmless so long as the "ground" for the district court's sentence—described at the level of generality used in Section 3553(a)—appears somewhere in the PSR or is mentioned at sentencing. *Compare* 18 U.S.C. § 3553(a)(2)(C) ("to protect the public from further crimes of the defendant"), *with* Gov't Br. 43-45 (error is harmless because issues at sentencing implicated "future dangerousness" and "[t]he likelihood that petitioner would commit future crimes"). That approach would render virtually all notice errors harmless and undermine the effectiveness of the rule. Under Section 3553(a)(1), for example, a district court may impose a non-guideline sentence based on "the nature and circumstances of the offense and the history and characteristics of the defendant." But *every* PSR and sentencing hearing must address those factors. Fed. R. Crim. P. 32(d)(2)(A). Reasonable notice is required to alert the parties to the *aspect* of the offense or the defendant's history that, in the court's view, might justify a non-guideline sentence. If general discussion of the relevant Section 3553(a) factor were sufficient to make any

error harmless, district courts could disregard the notice requirement with impunity.

3. Relying on the FMC report, the government asserts that Mr. Irizarry's decision to forego treatment on a voluntary basis while hospitalized proves that the failure to provide notice was harmless. *See* Gov't Br. 46-47; FMC Report 11, 14 (indicating that Mr. Irizarry had declined medication and was "not motivated to engage in any treatment"). The district court, however, unquestionably had the authority to *compel* Mr. Irizarry to undergo psychiatric treatment as a condition of supervised release. *See* 18 U.S.C. §§ 3563(b)(9), 3583(d); J.A. 376 (directing Mr. Irizarry to participate in whatever mental health treatment program the probation office deemed appropriate). Mr. Irizarry's willingness to volunteer for treatment is therefore irrelevant to the "kind of supervision" at the district court's disposal. J.A. 374.

The government also repeats its claim (Gov't Br. 45) that the error is harmless "because there is only a nine month difference" between the sentence imposed and the guideline maximum. Yet the relatively small size of the variance just as easily cuts against harmlessness by indicating that a more modest showing could have persuaded the court to stay within the guideline range. *See United States v. Cousins*, 469 F.3d 572, 580-81 (6th Cir. 2006) (concluding that "the minimal variance that [the judge] imposed—a mere two months above the top of the Guidelines range"—favors a finding of prejudice).

4. The government is correct that prejudice depends on a showing that the party "would have done things differently" with reasonable notice. *Himler*, 355 F.3d at 742. Courts of appeals have not hesitated to deem notice errors harmless where the party affected by the error fails to identify additional evidence or meaningfully different argument sufficient to cast doubt on the sentence imposed. *United States v. McClung*, 483 F.3d 273, 276-77 (4th Cir. 2007); *United States v. Gilmore*, 471 F.3d 64, 66 (2d Cir. 2006); *United States v. Meeker*, 411 F.3d 736, 744 (6th Cir. 2005).

In this case, however, the lack of reasonable notice had a substantial and injurious effect on the sentence. Although there is no evidence that Mr. Irizarry's mental condition can be "cured," *see* J.A. 269, every expert report has indicated that it is amenable to treatment. The FMC Report concluded that Mr. Irizarry's violent and threatening behavior following the end of his marriage is "linked to his maladaptive personality traits," and "paranoid delusions may have played some role as well." FMC Report 14. It also found that medication and treatment "could diminish the intensity of his paranoid ideations" while helping to address his "anxiety and depression." *Id.*; *see also* J.A. 146 (Dr. Buigas's testimony that available medications work even for more serious disorders); Bennett Report 5 (antipsychotic medications "may well improve" his "delusional thinking"). *See United States v. Fancher*, 513 F.3d 424, 431 (4th Cir. 2008) (failure to provide notice prejudicial because "had he been aware of the court's view that [the defendant] could not be re-

habilitated, counsel would have presented testimony from experts with experience in the treatment program, testimony that may have alleviated the court's concern about [the defendant's] likely success under the program and the risk of recidivism").

In addition, Dr. Bennett concluded that "[i]ncarceration is more likely to increase [Mr. Irizarry's] delusional thinking than decrease it." Bennett Report 5. The district court has never evaluated that conclusion, *see* J.A. 267-70, and, if accepted, that testimony alone would justify supervised release upon a condition of mandatory psychiatric care, rather than an extended term of imprisonment.

Because a critical and questionable rationale for the sentence went untested at the hearing, the error cannot be ignored as harmless.

CONCLUSION

The judgment of the court of appeals should be reversed and remanded for further proceedings.

Respectfully submitted,

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April 8, 2008

APPENDIX

2007 Sentencing Statistics

	Total Sentences*	Guidelines Departures	Non-Guideline *Booker*/3553(a)	Both Guidelines Departure and *Booker*/3553(a)	Neither Basis Specified	Total Non-Guideline Sentences*
D.C. Cir.	256	5	40	16	8	69 *27.0%*
1st Cir.	1,664	101	197	36	16	350 *21.0%*
2d Cir.	3,365	250	629	188	73	1,140 *33.9%*
3d Cir.	2,190	178	376	75	44	673 *30.7%*
4th Cir.	4,951	132	312	110	45	599 *12.1%*
5th Cir.	12,013	1,428	661	93	103	1,875 *15.6%*
6th Cir.	3,751	110	529	107	80	826 *22.0%*
7th Cir.	2,336	84	366	79	72	600 *25.7%*
8th Cir.	4,137	170	396	82	47	694 *16.8%*
9th Cir.	7,665	397	912	208	214	1,731 *22.6%*
10th Cir.	4,100	211	400	74	50	735 *17.9%*
11th Cir.	5,569	116	643	88	56	903 *16.2%*
All Circuits	51,997	2,081	5,448	1,156	808	9,493 *18.3%*

Source: U.S. Sentencing Commission, *Final Year Quarterly Data Report, Fiscal Year 2007* (Mar. 19, 2008), Table 2, *available at* http://www.ussc.gov/sc_cases/ Quarter_Report_ Final_07.pdf.

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* Total Sentences excludes government-sponsored below-range sentences. *See Final Year Quarterly Data Report*, Table 2 n.6. Percentages are based on this total.

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No. 06-7517 3-24-08

IN THE

Supreme Court of the United States

RICHARD IRIZARRY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF COURT-APPOINTED *AMICUS CURIAE* URGING AFFIRMANCE OF THE JUDGMENT BELOW

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QUESTION PRESENTED

Whether a criminal defendant forfeits his Sixth Amendment right "to be confronted with the witnesses against him" by causing a witness to be unavailable to testify, even if the defendant did not cause the witness's unavailability for the purpose of preventing the witness from testifying.

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IN THE

Supreme Court of the United States

No. 07-6053

DWAYNE GILES,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the Supreme Court of California

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit corporation with a membership of more than 10,000 attorneys and 28,000 affiliate members in 50 States, including private criminal defense lawyers, public defenders, and law professors.[1] NACDL was founded in 1958 to promote study in the field of

[1] The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amicus*, its members, and its counsel made such a contribution.

criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties guaranteed by the Bill of Rights and has a keen interest in ensuring that criminal proceedings are handled in a proper and fair manner. NACDL has frequently appeared before this Court as *amicus curiae*.

NACDL has grave concerns about the California Supreme Court's decision in this case. The decision expands the forfeiture doctrine well beyond its historical roots and thus denies defendants a right the Confrontation Clause, as originally understood, guarantees them. The decision would also greatly expand the use of unreliable *ex parte* testimony, impairing the fairness of criminal trials.

STATEMENT

Dwayne Giles was convicted in California state court of the first-degree murder of his ex-girlfriend, Brenda Avie. J.A. 36. Mr. Giles admitted killing Ms. Avie but claimed he acted in self-defense, testifying that she was a violent woman who had shot another man and had threatened people with knives. *Id.* at 34.

To prove that the killing was premeditated, the State introduced statements Ms. Avie had made to police officers three weeks earlier. In those statements, Ms. Avie accused Mr. Giles of threatening and assaulting her on another occasion. J.A. 35-36. The trial court admitted the statements under a recently enacted hearsay exception for certain "trustworthy" statements of unavailable witnesses. *Id.* at 36 (citing Cal. Evid. Code § 1370).

It is undisputed that the prosecution's introduction of Ms. Avie's statements rendered her a "witness" against Mr. Giles within the meaning of the Confrontation Clause. J.A. 39. The statements were made outside Mr.

Giles' presence, and he had no opportunity to cross-examine her to test the truth of her accusations. Nonetheless, the California Supreme Court held that the statements did not infringe Mr. Giles' right "to be confronted with the witnesses against him," U.S. Const. amend. VI, because he had forfeited that right by killing Ms. Avie—the same offense for which he was on trial. J.A. 32.

The court rejected the argument that forfeiture applies only where a defendant renders a witness unavailable to prevent her from testifying (a requirement that Federal Rule of Evidence 804(b)(6) expressly imposes in federal prosecutions). J.A. 39-57. The court conceded that the forfeiture doctrine was "generally applied" in that context. *Id.* at 45. But it held that forfeiture was not so limited because early cases "did not specifically address the intention of the defendants" and the rule was based on "broad equitable principles." *Id.* at 41 n.3, 52.

SUMMARY OF ARGUMENT

I. The California Supreme Court's decision represents a dramatic departure from the traditional rule governing forfeiture of confrontation rights. At the framing and for at least a century thereafter, forfeiture was a narrow rule of unavailability: If a witness testified against the defendant at his pretrial hearing but the defendant then procured the witness's absence from trial, the pretrial deposition could be admitted. Procurement of a witness's absence was treated like death, illness, or other types of unavailability that justified admitting prior testimony where the defendant had had an earlier opportunity to cross-examine the witness. That rule was extended during the twentieth century to cover any sort of hearsay statement where the defendant procured the declarant's absence for the purpose of preventing him from testifying. The California Supreme Court's rule goes far beyond both the framing-era rule and its modern counter-

part: According to that court, forfeiture applies whenever a defendant merely *wrongfully causes* a potential trial witness's absence—even where the misconduct is wholly unrelated to the declarant's status as a witness.

That new rule lacks any historical support. Early authorities' descriptions of the forfeiture rule make clear that they had only witness-tampering in mind. The context in which the rule arose confirms that focus: The forfeiture rule governed testimony against the defendant at his pretrial hearing, *after* the crime had been committed and prosecution was underway. The reason early authorities did not elaborate on the defendant's intent is not that intent was irrelevant, but that it was a given: Where a witness had already testified against the defendant at his pretrial hearing, the likelihood that a defendant would procure his absence by wrongful conduct for some reason *unrelated to* his status as a witness was so minuscule as to be unworthy of comment.

II. The framing-era law of dying declarations confirms that. If the State's version of forfeiture were historically accurate, courts would have routinely admitted statements of dying witnesses accusing their alleged killers on forfeiture grounds. But such statements were *not* admitted on that ground—only on the wholly different theory that consciousness of impending death made them uniquely reliable. When a witness was not sufficiently aware of his imminent death, moreover, his statements were *excluded*. That result would be wholly inexplicable if the State's theory of forfeiture were correct.

III. The decision below would not only deny defendants constitutional rights that the Sixth Amendment guarantees them, but also vastly expand the use of unreliable *ex parte* testimony in criminal trials. States recognize many different forms of unavailability, all of which will no doubt form the basis for forfeiture claims if this Court affirms the decision below. The state court's deci-

sion would thus vastly expand the use of *ex parte* testimony in criminal trials—precisely the sort of evidence the Confrontation Clause was designed to exclude.

ARGUMENT

The Confrontation Clause guarantees a criminal defendant the right "to be confronted with the witnesses against him." U.S. Const. amend. VI. That provision secures "the right of confrontation [as it existed] at common law, admitting only those exceptions established at the time of the founding." *Crawford* v. *Washington*, 541 U.S. 36, 54 (2004). There is no dispute that the State's introduction of Ms. Avie's testimony rendered Ms. Avie a "witness[] against" Mr. Giles, or that he had no opportunity to "confront[]" her. The case thus turns on whether the testimony falls within a framing-era exception to the rule. The State cannot make that showing.

I. This Case Falls Far Outside the Limited Scope of the Framing-Era Forfeiture Rule

Federal Rule of Evidence 804(b)(6) reflects the modern understanding of forfeiture applied in federal courts: Hearsay is admissible "against a party that has engaged or acquiesced in wrongdoing that *was intended to, and did*, procure the unavailability of the declarant *as a witness*." Fed. R. Evid. 804(b)(6) (emphasis added). The California Supreme Court adopted an even broader conception of the forfeiture doctrine—one that applies to misconduct that causes a witness's absence even if wholly unrelated to his status as a witness. The historical record does not remotely support that rule. To the contrary, the framing-era forfeiture rule was narrower than even the modern *federal* rule that the state court rejected.

At the framing, forfeiture was not a free-standing hearsay exception but a species of unavailability—akin to death or illness—that justified admitting an absent witness's prior cross-examined testimony from a pretrial

hearing. That context makes clear that forfeiture was fundamentally a rule about witness-tampering: Where the crime has already been completed, the prosecution is already underway, and the witness has already accused the defendant in a formal proceeding, there is no realistic likelihood that a defendant would engage in misconduct that renders the witness unavailable for some reason *unrelated to* his status as a witness. The decision below thus extends forfeiture well beyond its historical scope.

A. The Framing-Era Forfeiture Rule Was a Narrow Rule of Unavailability That Applied to Prior Cross-Examined Testimony

1. In England, pretrial proceedings in criminal cases were governed by the so-called Marian statutes, 1 & 2 Phil. & M., c. 13 (1554), and 2 & 3 Phil. & M., c. 10 (1555). According to those statutes, when witnesses believed someone had committed a felony, they were to bring him before a justice of the peace, who would examine both the witnesses and the suspect to decide whether to bail the suspect or commit him to jail to await trial. The depositions from those "committal" hearings were then sent to the court. The statutes also directed coroners to take depositions of witnesses during their pretrial homicide inquests. *Ibid.*; see generally John H. Langbein, *Prosecuting Crime in the Renaissance* 5-20 (1974); John H. Langbein, *The Origins of Adversary Criminal Trial* 40-47, 273-77 (2003); J.M. Beattie, *Crime and the Courts in England* 268-81 (1986).

Those Marian pretrial depositions were an attractive source of evidence if a witness later became unavailable before trial. England's twelve judges laid down the rules governing their admissibility in 1666. That year, Lord Morley was tried before the House of Lords for killing another man after a quarrel, and the twelve judges advised the House on the admissibility of depositions that had been taken by the coroner. *Lord Morley's Case*, Kel.

53, 84 Eng. Rep. 1079, 6 How. St. Tr. 769 (H.L. 1666). The twelve judges resolved that the depositions were admissible if the witness was "dead or unable to travel," or—as relevant here—"detained by the means or procurement of the prisoner." Kel. at 55, 84 Eng. Rep. at 1080; see also 6 How. St. Tr. at 776-77 ("dead" or "withdrawn by the procurement of the prisoner").

At Lord Morley's trial, the Crown read the coroner's depositions of three witnesses who had died. 6 How. St. Tr. at 776. The court, however, excluded the deposition of a fourth witness who had "run away" after telling his friends that "Lord Morley's Trial was to be shortly but he would not be there." *Id.* at 777. That, the court ruled, was not sufficient to show witness-tampering. *Id.* at 776-77. Consistent with that ruling, when Lord Morley's accomplice was later tried before the King's Bench, the Crown read the depositions of two of the witnesses who had died but apparently did not even offer the deposition of the witness who had merely run away. See *Bromwich's Case*, 1 Lev. 180, 83 Eng. Rep. 358 (K.B. 1666).

For centuries, Lord Morley's case governed the admissibility of Marian depositions—both coroners' depositions and committal depositions before justices of the peace. In 1692, for example, a coroner's deposition was read at the murder trial of Henry Harrison after the Crown showed that a man had "asked [the witness], if he was not an evidence [*i.e.*, witness] against Mr. Harrison," and then "pulled out a piece of money, and offered it [to] him, desiring him to be kind to Mr. Harrison." *Harrison's Case*, 12 How. St. Tr. 833, 851-52 (1692). Four years later, in Fenwick's parliamentary attainder proceedings, one speaker invoked the Marian forfeiture rule to justify admitting a witness's deposition before a justice of the peace, after the defendant's associates apparently bribed the witness to abscond: "[W]here persons do stand upon their lives, accused for crimes, if it appears to

the court that the prisoner hath, by fraudulent and indirect means, procured a person that hath given information against him to a proper magistrate, to withdraw himself, so that he cannot give evidence as regularly as they used to do; in that case his information hath been read * * * ." *Fenwick's Case*, 13 How. St. Tr. 537, 594 (H.C. 1696) (Lovel); see also *id.* at 596 (Sloane).[2]

Summarizing the law in 1721, Hawkins wrote: "[T]he Examination of an Informer * * * either before a Coroner upon an Inquisition of Death in pursuance of 1 & 2 *Ph. & M.* 13 or before Justices of Peace in pursuance of 1 & 2 *Ph. & M.* 13 and 2 & 3 *P. & M.* 10 upon a Bailment or Commitment for any Felony, may be given in Evidence at the Trial * * * [if] such Informer is dead, or unable to travel, or kept away by the Means or Procurement of the Prisoner * * * ." 2 William Hawkins, *A Treatise of the Pleas of the Crown* 429 (1721) (footnotes omitted). Other authorities stated the same rule. See, *e.g.*, 1 Richard Burn, *The Justice of the Peace and Parish Officer* 287-88 (1755). Forfeiture was thus a species of unavailability—akin to death or illness—that justified admitting a witness's pretrial Marian deposition.

2. Marian committal hearings were normally conducted in the prisoner's presence (their purpose, after all, was to determine whether to commit the prisoner to jail). Over the eighteenth century, the view emerged that those hearings offered the prisoner at least a theoretical opportunity to confront and cross-examine his accusers. See generally Kry, *Confrontation Under the Marian*

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[2] The rule was of questionable applicability there. Among other things, Fenwick was charged with treason while the Marian statutes applied only to felonies; those were considered separate categories of offenses. See 13 How. St. Tr. at 602 (Musgrave). The deposition was admitted largely on the ground that the rules of evidence did not bind Parliament. See *id.* at 591-607.

Statutes, 72 Brook. L. Rev. 493 (2007). Lord Morley's case and its progeny were then interpreted to mean that a witness's unavailability justified admitting only *properly taken* committal depositions—*i.e.*, depositions taken in the prisoner's presence, affording an opportunity for cross-examination. That view was widely,[3] although not uniformly,[4] held around the time of the framing, and was consistently followed in early American cases.[5]

Coroners' depositions, by contrast, would not necessarily be taken in the defendant's presence, and English authorities thus had greater difficulty rationalizing their admissibility. See, *e.g.*, Thomas Peake, *A Compendium of the Law of Evidence* 64 n.(m) (3d ed. 1808) (questioning rule but acknowledging that the practice was to admit them "without inquiry whether the party was present or

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[3] See *Fenwick's Case*, 13 How. St. Tr. at 602 (Musgrave); Thomas Wood, *An Institute of the Laws of England* 671 (9th ed. 1763) (*semble*); Julius Goebel, Jr. & T. Raymond Naughton, *Law Enforcement in Colonial New York* 634-35 (1944) (1766 protest); *Ayrton* v. *Addington* (1780), in 2 James Oldham, *The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century* 1023, 1024-26 (1992); 1 John Morgan, *Essays upon the Law of Evidence, New Trials, Special Verdicts, Trials at Bar, and Repleaders* 431 (1789) (*semble*); *King* v. *Radbourne*, 1 Leach 457, 460-61, 168 Eng. Rep. 330, 332 (1787) (reported 1789/1800); *King* v. *Woodcock*, 1 Leach 500, 501-02, 168 Eng. Rep. 352, 352-53 (1789) (reported 1789); *King* v. *Dingler*, 2 Leach 561, 562-63, 168 Eng. Rep. 383, 383-84 (1791) (reported 1800); 4 William Hawkins, *A Treatise of the Pleas of the Crown* 423 (Leach 7th ed. 1795); *King* v. *Eriswell*, 3 T.R. 707, 710 n.(c), 100 Eng. Rep. 815, 817 n.(c) (K.B. 1790) (reporter's note 1797); Thomas Peake, *A Compendium of the Law of Evidence* 40-41 (1801); and other authorities cited in Kry, *supra*, at 495-96 nn.11-12, 512-24, 530-41.

[4] See, *e.g.*, *Eriswell*, 3 T.R. at 713-14, 100 Eng. Rep. at 819 (Buller, J.).

[5] See *State* v. *Webb*, 2 N.C. (1 Hayw.) 103, 104 (Super. 1794); *State* v. *Moody*, 3 N.C. (2 Hayw.) 31, 31-32 (Super. 1798) (Haywood, J.); *Johnston* v. *State*, 10 Tenn. (2 Yer.) 58, 59-60 (1821); and other cases cited in Kry, *supra*, at 496-97 n.13.

not"). One rationale offered was that inquests were such notorious proceedings that everyone was presumed to be aware of them, and thus to have had at least a constructive opportunity to cross-examine. See 2 Thomas Starkie, *A Practical Treatise on the Law of Evidence* *492 (1st Am. ed. 1826) (1824); *King* v. *Eriswell*, 3 T.R. 707, 722, 100 Eng. Rep. 815, 824 (K.B. 1790) (Kenyon, C.J.).

American authorities, however, refused to indulge that fiction for coroners' depositions and insisted on an actual opportunity for cross-examination. See *State* v. *Campbell*, 30 S.C.L. (1 Rich.) 124, 131-32 (App. L. 1844); *People* v. *Restell*, 3 Hill 289, 297 (N.Y. Sup. Ct. 1842); *State* v. *Hill*, 20 S.C.L. (2 Hill) 607, 610 (App. L. 1835); *State* v. *Houser*, 26 Mo. 431, 436 (1858) (*ex parte* coroners' depositions had "never been permitted [as evidence] in this country"). In *Campbell*, for example, the court excluded the coroner's deposition of a deceased witness because the defendant was not present at the inquest. The court first described Lord Morley's case as "quite uncertain, as to the precise point of the absence of the accused at the taking of the depositions." 30 S.C.L. at 127. Apparently not wholly satisfied by that distinction, the court then characterized Lord Morley's case as a "precedent[], not to follow, but to deter," and opined that, "without disrespect to the twelve judges of England," their entire decision was "*obiter dicta*" entitled to no more weight than an earlier state-court decision. *Id.* at 127, 131. Years later, this Court described *Campbell* as if that holding were self-evident. See *Mattox* v. *United States*, 156 U.S. 237, 241 (1895) ("of course it was held to be inadmissible"). The rules of Lord Morley's case thus came to be understood as conditions for admitting prior *cross-examined* testimony.

3. That was no less true in forfeiture cases than in cases involving other types of unavailability. Thus, for example, Archbold wrote that committal depositions

were admissible if the witness was "dead, or unable to travel, or * * * kept away by the means or procurement of the prisoner"—but added that, "to be thus given in evidence, [the depositions] must have been taken in the presence of the prisoner, so that he might have had an opportunity of cross examining the witness." John Frederick Archbold, *A Summary of the Law Relative to Pleading and Evidence in Criminal Cases* 85 (1822) (citation omitted). Chitty likewise wrote that committal depositions were admissible if the witness was "dead, or not able to travel, or * * * kept away by the means and contrivance of the prisoner"—but must also be "done in the presence of the party accused, in order that he may have the advantage of cross-examining the witnesses." 1 Joseph Chitty, *A Practical Treatise on the Criminal Law* 79-81 (1816) (footnotes omitted). Phillipps agreed: Committal depositions were admissible if the witness was "dead, or not able to travel, or * * * kept away by the means and contrivance of the prisoner"—but only if taken "in the presence of the prisoner." S.M. Phillipps, *A Treatise on the Law of Evidence* 277 (2d ed. 1815) (1814) (footnotes omitted); see also *Queen* v. *Scaife*, 17 Q.B. 238, 238-39, 117 Eng. Rep. 1271, 1271 (1851) (committal deposition taken "in the presence of the prisoners" admitted against one defendant on forfeiture grounds).

American courts likewise understood forfeiture as a basis for admitting prior *cross-examined* testimony. In *Drayton* v. *Wells*, 10 S.C.L. (1 Nott & McC.) 409 (Const. Ct. 1819), the court addressed the admissibility of prior trial testimony. It listed being "kept away by the contrivance of the opposite party"—along with death, insanity, and absence overseas—as grounds for admitting the testimony, *provided that* the earlier trial was "between the same parties" and "the point in issue was the same," conditions that ensured an opportunity to cross-examine. *Id.* at 411. In a colonial case, *Rex* v. *Barber*, 1 Root 76

(Conn. Super. 1775), "[o]ne White, who had testified before the justice and before the grand jury against [the defendant] Barber * * * was sent away by one Bullock, a friend of Barber's, and by his instigation; so that he could not be had to testify before the petit jury." *Id.* at 76. The report states that the court admitted "evidence of what [White] had testified before the justice"—but contains no mention of admitting his (*ex parte*) grand jury testimony. *Ibid.*; see also *Williams* v. *State*, 19 Ga. 402, 403 (1856) (committal deposition).

Thus the law stood in 1879 when this Court decided *Reynolds* v. *United States*, 98 U.S. 145 (1879). That case involved a witness's testimony at a former trial for the same offense; the defendant was "present at the time the testimony was given, and had full opportunity of cross-examination." *Id.* at 161. The defendant concealed the witness so she could not be found for the second trial, and the Court admitted her former *cross-examined* testimony on forfeiture grounds. *Id.* at 158-61.

That was still the law when Wigmore wrote decades later. He too listed forfeiture, not as an independent hearsay exception, but as a type of unavailability akin to death or illness that justified admission *provided* "there ha[d] been cross-examination." 3 John H. Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* §§ 1401, 1405, at 111, 118-20 (2d ed. 1923). Thus, for at least a century after the framing, forfeiture was a species of unavailability like death or illness—it justified admitting prior *cross-examined* testimony but was not an independent hearsay exception.

B. The Framing-Era Forfeiture Rule Did Not Apply to Misconduct Unrelated to the Declarant's Status as a Witness

That history shows just how far the California Supreme Court departed from the narrow traditional forfei-

ture rule. Obviously, the statement at issue does not fall within the *framing-era* rule: It is not testimony from a pretrial hearing, former trial, or other occasion where the defendant had an opportunity to cross-examine. This Court, however, need not address the constitutionality of the modern, broader conception of forfeiture embodied in Federal Rule 804(b)(6), because the California Supreme Court's decision extends far beyond even that.

The state court held that forfeiture applies whenever a defendant wrongfully causes a witness's absence, even if the wrongful conduct is unrelated to that person's status as a witness. No historical authority extends forfeiture that far. *Every case* described above that actually admitted a statement on forfeiture grounds (which includes every case cited by *Reynolds* and every early case cited by the court below) involved witness-tampering. See *Harrison's Case*, 12 How. St. Tr. at 851-52 (bribery); *Fenwick's Case*, 13 How. St. Tr. at 550 (bribery); *Reynolds*, 98 U.S. at 159-60 (concealment); *Barber*, 1 Root at 76 (witness "sent away * * * so that he could not be had to testify"); *Scaife*, 17 Q.B. at 238-42, 117 Eng. Rep. at 1271-73 (similar). The court below conceded that forfeiture "generally applied * * * when the defendant intended to, and did, tamper with an actual or potential witness to prevent the witness from cooperating with the authorities or testifying at trial." J.A. 45. Indeed, the oldest case the court cited *outside* that context was from 1997. *Id.* at 46-51.

The court nonetheless claimed that intent was irrelevant because the early authorities "did not specifically address the intention of the defendants." J.A. 41 n.3. That is a strained reading at best. The authorities routinely described the forfeiture rule in terms suggesting that it was limited to witness-tampering. *Reynolds*, for example, referred to witnesses "corruptly kept away." 98 U.S. at 159. *Drayton* referred to witnesses "kept away

by the contrivance of the opposite party." 10 S.C.L. at 411. Treatises referred to witnesses "kept away by the means and contrivance of the prisoner." 1 Chitty, *supra*, at 81; Phillipps, *supra*, at 277. Those formulations are far more naturally read as connoting manipulation of the judicial process, not mere misconduct that causes a witness's absence.

Even if the descriptions were neutral, however, their context makes clear that the authorities had only witness-tampering in mind. The common-law forfeiture rule governed testimony against the defendant at his pretrial committal hearing, the coroner's inquest, or (by the nineteenth century) a former trial for the same offense. See pp. 6-12, *supra*. The rule thus applied to misconduct in contexts where the crime had *already* been completed, the prosecution was *already* underway, and the witness had *already* accused the defendant in a formal proceeding. In those contexts, the possibility that a defendant would engage in misconduct that rendered a witness unavailable for some reason *unrelated to* his status as a witness seems remote.[6]

The far more reasonable explanation for the early sources' failure to elaborate on intent is not that intent was irrelevant, but that it would so clearly exist in the particular pretrial context those sources were expounding that there was no point in addressing it. Intent sim-

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[6] One can imagine situations where a defendant injures a victim, the victim lingers long enough to testify at the pretrial hearing, but the victim then dies or succumbs to incapacity before trial. See, *e.g.*, *Radbourne*, 1 Leach at 458-60, 168 Eng. Rep. at 331-32. In those cases, however, the testimony would be admissible under the "death" or "illness" prongs of Lord Morley's case without regard to forfeiture. See Kel. at 55, 84 Eng. Rep. at 1080. Forfeiture mattered only if the defendant prevented the witness from testifying by means short of killing or injuring him (by threats, bribery, kidnapping, or the like).

ply was not an issue until the forfeiture rule was expanded beyond the Marian pretrial context to statements like those here, made before or shortly after the time of the underlying crime. Only then was it likely that a defendant might render a witness unavailable by misconduct unrelated to his status as a witness.

The California Supreme Court also invoked what it described as the "broad equitable principles" underlying the forfeiture rule. J.A. 52. No doubt, the rule was motivated by equity. But that does not mean a modern court can apply the rule whenever *it* thinks it would be equitable to do so. Procuring a witness's absence to manipulate the trial's truth-seeking function raises different considerations than merely causing a witness to be unavailable. The fact that forfeiture cases historically involved only the former situation shows that the Framers thought equity justified admitting *ex parte* testimony only in that situation. The Confrontation Clause "admit[s] only those exceptions established at the time of the founding." *Crawford*, 541 U.S. at 54. What matters is the traditional *scope* of the equitable forfeiture rule—not the mere fact that is was equitable.

II. The Framing-Era Treatment of Dying Declarations Refutes California's Version of the Forfeiture Rule

The framing-era treatment of dying declarations dispels any doubt that the California Supreme Court's rule is historically insupportable. For centuries, witnesses have made statements accusing their alleged killers after sustaining injuries that eventually resulted in their deaths. If California's version of forfeiture were accurate, those statements would be paradigmatic candidates for application of the forfeiture rule. But the cases failed to invoke any forfeiture rationale for admitting such statements. Moreover, courts adopted a limitation on admissibility that is wholly inconsistent with forfeiture prin-

ciples: They *excluded* the statements unless the witness was aware of his impending demise when he made them.

That result is wholly inconsistent with California's forfeiture rule. California's rule would justify admitting such statements against the alleged killer *whatever* the witness's mental state. The fact that no court or lawyer ever suggested admitting those excluded statements on forfeiture grounds is powerful evidence that the rule did not extend so far.

A. Dying Declarations Were Not Admitted on Forfeiture Grounds, Even When They Fell Squarely Within the California Supreme Court's Version of the Forfeiture Rule

1. By the mid-eighteenth century, it was settled in England that dying declarations were admissible against the defendant in a murder prosecution. See *King* v. *Ely* (1720), in 12 Charles Viner, *A General Abridgment of Law and Equity* 118 (c. 1757); *Rex* v. *Reason & Tranter*, 1 Strange 499, 499-500, 93 Eng. Rep. 659, 659-60, 16 How. St. Tr. 1, 24-38 (K.B. 1722); *Bambridge's Case*, 17 How. St. Tr. 397, 417 (1730). Early American courts followed the same rule. See, *e.g.*, *Respublica* v. *Langcake*, 1 Yeates 415, 416-17 (Pa. 1795); *State* v. *Moody*, 3 N.C. (2 Hayw.) 31, 31 (Super. 1798); *United States* v. *McGurk*, 26 F. Cas. 1097, 1097 (C.C.D.C. 1802) (No. 15,680). The rationale for that rule, however, was *not* that the defendant had forfeited his confrontation rights by killing the witness. Rather, the specter of impending death was thought to render the statements sufficiently trustworthy to dispense with the ordinary safeguards of oath and cross-examination.

As one framing-era court explained: "[T]he general principle on which this species of evidence is admitted is, that they are declarations made in extremity, when the party is at the point of death, and when every hope of this

world is gone: when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn, and so awful, is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of Justice." *King* v. *Woodcock*, 1 Leach 500, 502, 168 Eng. Rep. 352, 353 (1789) (reported 1789). Many other authorities identified the same rationale. See, *e.g.*, *King* v. *Drummond*, 1 Leach 337, 337-38, 168 Eng. Rep. 271, 272 (1784) (reported 1789) ("The principle upon which this species of evidence is received is, that the mind, impressed with the awful idea of approaching dissolution, acts under a sanction equally powerful with that which it is presumed to feel by a solemn appeal to God upon an oath."); 2 William Hawkins, *A Treatise of the Pleas of the Crown* 619 n.10 (Leach 6th ed. 1787) ("[T]his evidence seems to be admiss[i]ble only upon the idea, that no human motive can at such an awful moment interpose to bias the truth of what is asserted; and therefore the law considers the declarations of a person so dying as equal to the solemnity of an oath." (emphasis omitted)); cf. 1 Geoffrey Gilbert, *The Law of Evidence* 280 (Lofft ed. 1791).[7]

2. Because of that rationale, admissibility depended, not only on whether the witness later died, but on whether he *knew* he was dying. Only then would any motive to fabricate be extinguished. When a witness's apprehension of imminent death was not sufficiently shown, courts excluded his statements.

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[7] Indeed, references to the trustworthiness of dying declarations date as far back as Raleigh's case. See 2 How. St. Tr. 1, 18 (1603) ("*Nem moriturus praesumitur mentiri*"—a dying man never lies); *Trial of Sir Walter Raleigh* (1603), in 1 David Jardine, *Criminal Trials* 400, 435 (1832) ("a dying man is ever presumed to speak truth").

Thus, in *John's Case* (1790), in 1 Edward Hyde East, *A Treatise of the Pleas of the Crown* 357 (1803), a woman accused her husband of assaulting her and later died of her injuries. The husband objected to the statements at his murder trial because "it was not proved that she considered herself at the time as a dying person." *Id.* at 357. The court admitted the statements but referred the case to the twelve judges for review.[8] The judges unanimously ruled that "whether the deceased thought she was dying or not" was to be "decided by the judge before he receives the evidence," and a majority concluded that the statements should have been excluded in that case because "there was no foundation for supposing that the deceased considered herself in any danger at all." *Id.* at 358.

Likewise, in *Welbourn's Case* (1792), in 1 East, *supra*, at 358, a servant told an apothecary a mere hour before dying that another servant had poisoned her. She added, however, that "she believed that she was getting better from the pain ceasing." *Id.* at 359. The twelve judges ruled the statement inadmissible at the fellow servant's murder trial because "it did not sufficiently appear that the deceased knew or thought she was in a dying state when she made the declaration." *Id.* at 360.

Other English cases are to the same effect. In *King* v. *Woodcock*, 1 Leach 500, 168 Eng. Rep. 352 (1789), a woman told a magistrate before dying that her husband had assaulted her. The judge lamented that it "seem[ed] impossible to find out, whether the deceased herself apprehended that she was in such a state of mortality as would inevitably oblige her soon to answer before her

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[8] Although there was no formal appellate review in criminal cases, a court faced with a difficult legal issue could stay the execution and refer the case to all twelve judges, much like a modern *sua sponte en banc* process. See Langbein (2003), *supra*, at 212-13 & n.153.

Maker for the truth or falsehood of her assertions." *Id.* at 503, 168 Eng. Rep. at 353-54 (footnote omitted). He left the issue to the jury, instructing them not to consider the statement unless they thought she was "under the apprehension of death." *Id.* at 504, 168 Eng. Rep. at 354.[9]

In *Tinckler's Case* (1781), in 1 East, *supra*, at 354, the defendant objected to the alleged murder victim's dying declarations because "it appeared at the time of her declarations she was better, or thought herself so." *Id.* at 355. The twelve judges did not dispute that statements under such circumstances were inadmissible. But they approved the conviction because the witness had repeated her statements later, after taking a turn for the worse. *Id.* at 355-56.

In *King* v. *Radbourne*, 1 Leach 457, 168 Eng. Rep. 330 (1787) (reported 1789/1800), a woman died after testifying to a justice of the peace that her maid had assaulted her. At the maid's trial, the prosecution argued that the declaration, "by a person who was sensible she was about soon to give an account at the high tribunal of the Almighty, * * * was considered by the law to be made under a sanction more awful and impressive than that of an oath itself." *Id.* at 460-61, 168 Eng. Rep. at 332. The court, however, referred the case to the twelve judges because the witness did "not appear[], at the time she gave [the testimony], to be apprehensive of her approaching dissolution." *Id.* at 462, 168 Eng. Rep. at 333. The judges ruled that the statement (which had been sworn in the defendant's presence) was admissible on another ground—as prior Marian testimony of an unavailable

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[9] According to other reports, however, the judge himself resolved the issue. See *Woodcock's Case* (1789), in Thomas Leach, *Cases in Crown Law* 437, 441-42 (1st ed. 1789); *Trial of William Woodcock*, Old Bailey Sessions Papers, Jan. 14, 1789, at 95, 111-12.

witness. See 1 East, *supra*, at 356; cf. Peake (1801), *supra*, app. 1, at 144 & n.*.

In *King* v. *Dingler*, 2 Leach 561, 168 Eng. Rep. 383 (1791) (reported 1800), a woman testified to a magistrate that her husband had assaulted her, and died eleven days later. *Id.* at 561-62, 168 Eng. Rep. at 383. At the husband's murder trial, the prosecution counsel conceded that the testimony "was not such an examination of a person under apprehension of immediate death as would, on that principle, authorize the production of it in evidence." *Id.* at 563, 168 Eng. Rep. at 384. The testimony was therefore excluded. See *ibid.*; see also Leonard MacNally, *The Rules of Evidence on Pleas of the Crown* 381-87 (1802); 1 East, *supra*, at 353-54; cf. 2 Hawkins (6th ed. 1787), *supra*, at 619 n.10.

3. Early American decisions were comparable. In *State* v. *Moody*, 3 N.C. (2 Hayw.) 31 (Super. 1798), the witness accused the defendant of wounding him; he died several weeks later. The court excluded the statements. It explained that dying declarations must be "of one so near his end that no hope of life remains, for then the solemnity of the occasion is a good security for his speaking the truth, as much so as if he were under the obligation of an oath." *Id.* at 31. "[I]f at the time of making the declaration he has reasonable prospects and hope of life, such declarations ought not to be received; for there is room to apprehend he may be actuated by motives of revenge and an irritated mind, to declare what possibly may not be true." *Ibid.*

In *Lewis* v. *State*, 17 Miss. (9 S. & M.) 115 (1847), the court reversed a murder conviction because the alleged victim's declarations were introduced without sufficient evidence that he was aware of his impending death. Dying declarations, the court explained, were admissible only because "[t]he danger of impending death is regarded as equivalent to the sanction of an oath." *Id.* at

119. Upon being stabbed, the witness had exclaimed "O my people!" but "said nothing else which indicated the apprehension of immediate death." *Id.* at 120. "This showing," the court held, "was not sufficient. It indicated alarm and suffering, but showed no sense of approaching dissolution." *Ibid.*

That same year, in *Nelson* v. *State*, 26 Tenn. (7 Hum.) 542 (1847), the court reversed another murder conviction for similar reasons. The witness there accused the defendant of attacking him but claimed he "'was not badly wounded and was not going to die.'" *Id.* at 543. He was, alas, "very greatly deceived as to his actual condition," and died not an hour later. *Ibid.* The court held the accusation inadmissible because "[i]t is the solemn state of the declarant's mind, in view of approaching death, which is thought to be equivalent to the sanction of an oath," and the declarant's "mind at the very moment of the declaration, according to his own view of the case, was not in the state necessary." *Ibid.*

Other cases reached similar results. Courts excluded the statements of dying witnesses where the witness did not apprehend his imminent death. See *United States* v. *Woods*, 28 F. Cas. 762, 763 (C.C.D.C. 1834) (No. 16,760); *Montgomery* v. *State*, 11 Ohio 424, 425-26 (1842); *Smith* v. *State*, 28 Tenn. (9 Hum.) 9, 17-23 (1848). And they admitted such statements only after concluding that the requisite mental state had been shown. See *United States* v. *Veitch*, 28 F. Cas. 367, 367-68 (C.C.D.C. 1803) (No. 16,614); *King* v. *Commonwealth*, 4 Va. (2 Va. Cas.) 78, 80-81 (Gen. Ct. 1817); *Gibson* v. *Commonwealth*, 4 Va. (2 Va. Cas.) 111, 121 (Gen. Ct. 1817); *State* v. *Poll*, 8 N.C. (1 Hawks) 442, 444 (1821); *State* v. *Ferguson*, 20 S.C.L. (2 Hill) 619, 623-24 (App. L. 1835); *Anthony* v. *State*, 19 Tenn. (Meigs) 265, 277-80 (1838); *McLean* v. *State*, 8 Mo. 153, 157-59 (1843); *Hill* v. *Commonwealth*, 43 Va. (2 Gratt.) 594, 607-11 (Gen. Ct. 1845); *McDaniel* v. *State*, 16

Miss. (8 S. & M.) 401, 415-16 (1847);[10] *Logan* v. *State*, 28 Tenn. (9 Hum.) 24, 25-26 (1848); *McLean* v. *State*, 16 Ala. 672, 674-75 (1849); *People* v. *Wood*, 2 Edm. Sel. Cas. 71, 74-75 (N.Y. Sup. Ct. 1849). Statements of dying witnesses were thus admissible against their accused killers *only* if the witness anticipated his imminent demise.

B. The Dying-Declaration Cases Foreclose California's Rule

1. That history of dying declarations forecloses the California Supreme Court's rule. In dozens of cases, courts either excluded a dead witness's statement accusing his alleged killer because the declarant was not aware of his impending death, or admitted the statement only because the declarant *was* aware of his impending death. Those decisions cannot be reconciled with California's version of the forfeiture rule, which would admit *all* those statements without regard to the declarant's mental state. If any framing-era lawyer or judge shared California's understanding of the rule, surely someone would have tried to invoke it. But the statements were analyzed only as dying declarations; if they failed to qualify on that basis, they were excluded.

If only a handful of cases were at issue, they might be written off as incompetent lawyering—a prosecution counsel overlooking another potentially applicable exception. The sheer number of cases, however, makes that explanation implausible. In many cases, moreover, the prosecution was well represented. In *Radbourne*, for example, the Crown counsel was William Garrow, 1 Leach at 460, 168 Eng. Rep. at 332, "the dominant [criminal] barrister of the day," Langbein (2003), *supra*, at 243, and

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[10] Although *McDaniel* briefly alludes to equitable considerations, 16 Miss. at 416, the court did not treat those considerations as an independent basis for admitting the statements; rather, it made clear that apprehension of imminent death was required, see *id.* at 415-16.

"one of the foremost counsel of the era," Landsman, *The Rise of the Contentious Spirit*, 75 Cornell L. Rev. 497, 551 (1990); see also Beattie, *Scales of Justice*, 9 Law & Hist. Rev. 221, 236-47 (1991). Admissibility in that case was far from clear, see pp. 19-20, *supra*, and if anyone could be expected to raise every conceivably applicable hearsay exception, Garrow surely could.

That omission is all the more striking because California's version of the forfeiture rule would subsume the dying-declaration rule in the mine-run of cases. At least in the nineteenth century, the rule in most jurisdictions was that dying declarations were admissible *only* in homicide prosecutions. See 3 Wigmore, *supra*, §§ 1431-32, at 162-64. But the vast majority of dying declarations in homicide cases would also qualify under California's version of the forfeiture rule. Even if one could imagine exceptions, cf. *Dunn* v. *State*, 2 Ark. 229, 245-47 (1840) (defendant proffered victim's declaration that he was "shot by mistake"), as a practical matter, California's approach to forfeiture would all but swallow the dying-declaration rule.

2. The California Supreme Court made no attempt to explain the historical treatment of dying declarations. Professor Richard Friedman (whose scholarship is largely responsible for the line of cases that includes the decision below) does address the issue in his *amicus* brief. See Br. of Richard D. Friedman as *Amicus Curiae* in Support of Pet. for Cert. 11-14 (Nov. 29, 2007) ("Br."). On this point, however, his arguments are unpersuasive.

Professor Friedman does not dispute that trustworthiness was the "traditional" rationale for admitting dying declarations. Br. 13. He contends, however, that that rationale is "absurd" because dying declarations are not particularly trustworthy. *Id.* at 12. He accordingly suggests that their admissibility is better explained on forfeiture grounds. *Id.* at 11.

That Professor Friedman does not find the framing-era rationale persuasive, however, does not change what that rationale actually was. The Confrontation Clause "admit[s] only those exceptions established at the time of the founding." *Crawford*, 541 U.S. at 54. This Court cannot, consistent with that holding, *reject* the framing-era rationale for admitting dying declarations, replace it with a new rationale, and then rely on that new rationale to broaden the exception so as to admit testimony the original rule would have excluded.[11]

Professor Friedman further argues that the traditional rationale for admitting dying declarations is inconsistent with *Crawford*'s rejection of a reliability-based approach. Br. 12-13. The doctrine that *Crawford* rejected, however, was the amorphous and ahistorical rule that *ex parte* testimony *of any sort* was admissible if sufficiently reliable, see *Ohio* v. *Roberts*, 448 U.S. 56, 66 (1980)—not the well-defined and eminently historical rule that *dying declarations* are admissible because they were deemed reliable. The "right" the Confrontation Clause categorically protects is the right to confrontation as it existed at common law. Admitting dying declarations is consistent with that right. See *Crawford*, 541 U.S. at 56 n.6. Admitting *other* sorts of "reliable" *ex parte* testimony is not.

Finally, Professor Friedman contends that it would be an "abomination" to exclude statements where the defendant caused the witness's unavailability. Br. 13-14. In case after case, however, framing-era courts did precisely that. See pp. 17-22, *supra*. It is not an "abomination" to

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[11] Ironically, the California Supreme Court has previously held that the dying-declaration exception survives *Crawford* on purely historical grounds, without reference to forfeiture principles. See *People* v. *Monterroso*, 101 P.3d 956, 971-72 (Cal. 2004).

apply the Confrontation Clause as it was written and originally understood. That is simply the rule of law.

The State denied Mr. Giles the right "to be confronted with the witnesses against him" under any conceivable literal meaning of those terms. It justifies doing so on the basis of a purported historical exception, but it cannot cite a single case applying the exception in a remotely similar context, even though dozens of cases presented similar fact patterns and would have been prime candidates for application of the rule. Instead, the State relies on the purported failure of *factually inapposite* forfeiture cases to *exclude* the rule's application here. This Court should insist on a more compelling historical showing before creating an exception to a right the Sixth Amendment expressly provides.

III. The California Supreme Court's Decision Would Significantly Expand the Use of Unreliable *Ex Parte* Testimony in Criminal Trials

The absence of any meaningful historical support for the California Supreme Court's holding is reason enough to reject it. But the court's rule also threatens the fundamental fairness of criminal trials by inviting widespread use of unreliable *ex parte* testimony.

A. The California Supreme Court's Rule Could Be Extended to a Wide Variety of Cases

As the California Supreme Court acknowledged, until recently, courts generally applied the forfeiture rule only to witness-tampering. J.A. 45. Since *Crawford*, however, the doctrine has exploded, as prosecutors—confronted with the demise of *Ohio* v. *Roberts*—have sought new ways to introduce *ex parte* testimony. That trend will only accelerate if this Court affirms the decision below.

1. In homicide cases alone, California's rule would radically expand the use of unreliable *ex parte* testimony. Traditionally, courts admitted a decedent's prior *ex parte*

accusations in a murder prosecution only if they qualified as dying declarations. Thus, *only* statements made immediately before the witness's death would be admitted. California's rule, by contrast, would seem to justify admitting virtually anything the alleged murder victim ever said. In this case, for example, the statement was made three weeks before the shooting. J.A. 32, 35. Other courts have admitted statements even more remote: In *United States* v. *Garcia-Meza*, 403 F.3d 364 (6th Cir. 2005), the court allowed statements the defendant's wife had made *five months* before her death, accusing the defendant of assaulting her on another occasion because "he was angry that she had been talking to a former boyfriend." *Id.* at 366, 369. The court explained that "[t]he Defendant, regardless of whether he intended to prevent the witness from testifying against him or not, would benefit through his own wrongdoing if such a witness's statements could not be used against him, which the rule of forfeiture, based on principles of equity, does not permit." *Id.* at 370-71.

Other courts have relied on similarly broad forfeiture theories to admit a wide variety of statements of alleged homicide victims. See, *e.g.*, *State* v. *Mason*, 162 P.3d 396, 401-05 (Wash. 2007); *State* v. *Jensen*, 727 N.W.2d 518, 527-35 (Wis. 2007); *People* v. *Bauder*, 712 N.W.2d 506, 511-15 (Mich. Ct. App. 2005). Some courts have relied on forfeiture to admit more traditional dying declarations. See *State* v. *Meeks*, 88 P.3d 789, 792-95 (Kan. 2004), overruled in part on other grounds by *State* v. *Davis*, 158 P.3d 317, 322 (Kan. 2006); *United States* v. *Mayhew*, 380 F. Supp. 2d 961, 963-69 (S.D. Ohio 2005); *Gonzales* v. *State*, 155 S.W.3d 603, 605-06, 609-11 (Tex. App. 2004), aff'd on other grounds, 195 S.W.3d 114, 125 (Tex. Crim. App. 2006). But even those courts, by discarding the traditional rationale for admitting such statements, invite further expansion of the forfeiture rule.

2. If this Court affirms the decision below, moreover, prosecutors will attempt to extend California's rule beyond homicide cases. Although the witness in this case was dead, forfeiture historically was not limited to dead witnesses. See pp. 6-12, *supra*. Prosecutors would seek to introduce *ex parte* statements in cases involving other types of unavailability caused by the defendant.

Courts have recognized broad theories of unavailability. For example, some courts have deemed witnesses "unavailable" where the witness claimed to be psychologically or emotionally unable to testify. See, *e.g.*, *People* v. *Stechly*, 870 N.E.2d 333, 373 (Ill. 2007) ("[U]navailability includes those child witnesses who are unable to testify because of fear."); Carter & Lyons, *The Potential Impact of* Crawford v. Washington *on Child Abuse, Elderly Abuse and Domestic Violence Litigation*, Champion, Sept.-Oct. 2004, at 21, 22 (defendant's mere presence in the courtroom can render a witness "emotionally unavailable"). California law expressly allows courts to treat certain witnesses as "medically unavailable" if "testimony would cause the[m] emotional trauma." Cal. Penal Code § 1346(d); see also Colo. Rev. Stat. § 18-3-413(3).

Since *Crawford*, prosecutors have routinely attempted to combine those broad concepts of unavailability with broad notions of forfeiture. They argue that defendants forfeit their confrontation rights whenever the offense for which they are being prosecuted rendered the witness psychologically unavailable to testify—or, indeed, even *available* to testify but at the cost of further psychological trauma. In *People* v. *Moreno*, 160 P.3d 242 (Colo. 2007), for example, a trial court found an alleged child abuse victim unavailable because testifying would cause her to be "retraumatized"; "she could suffer enhanced anxiety, fear, and humiliation; and the 'trauma bond' between her and the defendant could be renewed." *Id.* at 247. The State proffered her earlier *ex parte* testimony,

arguing that the defendant had "forfeited" his confrontation rights because his alleged acts of child abuse were responsible for the witness's trauma. *Id.* at 246. The Colorado Supreme Court rejected that argument only because it held, contrary to the California Supreme Court below, that intent to prevent a witness from testifying was required for forfeiture to apply. *Id.* at 247; see also *Stechly*, 870 N.E.2d at 340-41, 348-54; *State* v. *Henderson*, 160 P.3d 776, 793 (Kan. 2007).

Commentators have likewise taken up the charge. One author argues that forfeiture should apply in domestic-violence cases, even in the absence of a specific threat to the witness not to testify, so long as the State shows the "existence of a battering relationship built on power and control dynamics." King-Ries, *Forfeiture by Wrongdoing: A Panacea for Victimless Domestic Violence Prosecutions*, 39 Creighton L. Rev. 441, 444, 463 (2006). Another author similarly argues: "Whether the reason is fear of retaliation, physical terror of seeing the abuser, or a desire to please and remain with the abuser, the cause of a victim's unavailability is the same—procurement by the abuser through the abuse itself." Krischer, *"Though Justice May Be Blind, It Is Not Stupid": Applying Common Sense to Crawford in Domestic Violence Cases*, Prosecutor, Nov.-Dec. 2004, at 14, 16.

Unavailable witnesses are a routine feature of domestic-violence and child-abuse cases. "[E]ighty to ninety percent of domestic violence victims who appeal to the criminal justice system for help recant or otherwise fail to assist the prosecution at some point in the proceedings." *State* v. *Mechling*, 633 S.E.2d 311, 324 (W. Va. 2006). Child abuse prosecutions encounter similar issues. See Raeder, *Remember the Ladies and the Children Too: Crawford's Impact on Domestic Violence and Child Abuse Cases*, 71 Brook. L. Rev. 311, 374-77 (2005). Before *Crawford*, prosecutors relied on *Roberts* to avoid

having to produce those alleged victims in court. See Huff, *Confronting* Crawford, 85 Neb. L. Rev. 417, 435-36 (2006). This Court should not allow an expansive and historically baseless forfeiture doctrine to become prosecutors' new tool of choice for evading confrontation rights.

B. The California Supreme Court's Rule Would Undermine the Fairness of Criminal Trials

Broad application of forfeiture would damage the fairness of criminal trials. Confrontation is not a mere procedural formality. As the Framers well knew, accusations of criminal conduct are not always true. The Confrontation Clause reflects the Framers' judgment that the crucible of cross-examination is the best—and only acceptable—method of ascertaining the truth. As any defense lawyer will attest, cross-examination is no less important to discovering the truth today. Compare, *e.g.*, 3 William Blackstone, *Commentaries on the Laws of England* 373-74 (1768) (cross-examination will "sift out the truth much better"), with Gerry Spence, *Win Your Case: How To Present, Persuade, and Prevail—Every Place, Every Time* 168-222 (2005) (cross-examination is "the one best pry to disgorge the whole truth").

The forfeiture doctrine allows convictions based on precisely the sort of evidence the Confrontation Clause was designed to guard against: untested—and thus presumptively unreliable—*ex parte* testimony. Here, for example, the State presented Ms. Avie's *ex parte* accusations of an earlier assault to prove that Mr. Giles murdered her. Mr. Giles had no opportunity to cross-examine Ms. Avie to show that her accusations were incomplete, misleading, or false; that she was biased or had some ulterior motive; or that her answers were the product of slanted questioning by overzealous police officers. Cf. 3 Blackstone, *supra*, at 373-74.

The state court thought that result "equitable" because Mr. Giles had murdered Ms. Avie. Of course, as in most cases, that fact was disputed. Ms. Avie's *ex parte* testimony was allowed, not because we *know* Mr. Giles murdered her, but because a panel of state judges made a finding to that effect. That is no small difference. The Framers secured the right to a common-law criminal trial "by witness and jury" (2 How. St. Tr. at 15-16) precisely because judges can make mistakes (and typically not in favor of defendants accused of heinous crimes). The Framers allowed narrow exceptions, long recognized at common law, for dying declarations or witness-tampering. The State's pleas of "equity" notwithstanding, this Court should go no further.

CONCLUSION

The decision of the California Supreme Court should be reversed.

Respectfully submitted.

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SUPREME COURT OF THE UNITED STATES

WILLIAM ERICKSON *v.* BARRY J. PARDUS ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 06–7317. Decided June 4, 2007

PER CURIAM.

Imprisoned by the State of Colorado and alleging violations of his Eighth and Fourteenth Amendment protections against cruel and unusual punishment, William Erickson, the petitioner in this Court, filed suit against prison officials in the United States District Court for the District of Colorado. He alleged that a liver condition resulting from hepatitis C required a treatment program that officials had commenced but then wrongfully terminated, with life-threatening consequences. Deeming these allegations, and others to be noted, to be "conclusory," the Court of Appeals for the Tenth Circuit affirmed the District Court's dismissal of petitioner's complaint. 198 Fed. Appx. 694, 698 (2006). The holding departs in so stark a manner from the pleading standard mandated by the Federal Rules of Civil Procedure that we grant review. We vacate the court's judgment and remand the case for further consideration.

Petitioner was incarcerated in the Limon Correctional Facility in Limon, Colorado, where respondents Barry Pardus and Dr. Anita Bloor were working as prison officials. After Dr. Bloor removed petitioner from the hepatitis C treatment he had been receiving, petitioner sued under 42 U. S. C. §1983, complaining, *inter alia*, that Dr. Bloor had violated his Eighth Amendment rights by demonstrating deliberate indifference to his serious medical needs. See, *e.g.*, *Estelle* v. *Gamble*, 429 U. S. 97, 104–105 (1976) ("[D]eliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton

infliction of pain . . . proscribed by the Eighth Amendment," and this includes "indifference . . . manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed" (footnotes and internal quotation marks omitted)); see also *Helling* v. *McKinney*, 509 U. S. 25, 35–37 (1993).

Petitioner based his claim on the following allegations, which we assume to be true for purposes of review here: Officials at Colorado's Department of Corrections (Department) diagnosed petitioner as requiring treatment for hepatitis C. After completing the necessary classes and otherwise complying with the protocols set forth by the Department, petitioner began treatment for the disease. The treatment, which would take a year to complete, involved weekly self-injections of medication by use of a syringe. Soon after petitioner began this treatment, prison officials were unable to account for one of the syringes made available to petitioner (and other prisoners) for medical purposes. Upon searching, they found it in a communal trash can, modified in a manner suggestive of use for injection of illegal drugs. Prisoner Complaint in Civ. Action No. 05–CV–00405–LTB–MJW (D. Colo.), p. 3 (hereinafter Petitioner's Complaint).

Prison officials, disbelieving petitioner's claim not to have taken the syringe, found that his conduct constituted a violation of the Colorado Code of Penal Discipline for possession of drug paraphernalia. Letter from Anthony A. DeCesaro to William Erickson (Sept. 30, 2004), attached to Petitioner's Complaint. This conduct, according to the officials, led to the "reasonable inference" that petitioner had intended to use drugs, so the officials removed petitioner from his hepatitis C treatment. *Ibid.* "The successful treatment of Hepatitis C is incumbent upon the individual remaining drug and alcohol free to give the liver a

better chance of recovery," they indicated, *ibid.*, an explanation they later offered to defend against petitioner's allegations of cruel and unusual punishment, see Defendants' Motion to Dismiss in Civ. Action No. 05–CV–00405–LTB–MJW, p. 10. Assuming that a person in the course of this treatment takes illicit drugs, the prison's protocol mandates a waiting period of one year followed by a mandatory drug education class lasting six months. Brief in Opposition 4. Petitioner therefore could face a delay of some 18 months before he would be able to restart treatment.

In his complaint petitioner alleged Dr. Bloor had "removed [him] from [his] hepatitis C treatment" in violation of department protocol, "thus endangering [his] life." Petitioner's Complaint 2. Petitioner attached to the complaint certain grievance forms. In these he claimed, among other things, he was suffering from "continued damage to [his] liver" as a result of the nontreatment. Colorado Dept. of Corrections Offender Grievance Form (June 30, 2004). The complaint requested relief including damages and an injunction requiring that the Department treat petitioner for hepatitis C "under the standards of the treatment [protocol] established by [the Department]." Petitioner's Complaint 8.

Three months after filing his complaint, and well before the District Court entered a judgment against him, petitioner filed a Motion for Expedited Review Due to Imminent Danger, in Civ. Action No. 05–B–405 (MJW) (D. Colo.). Indicating it was "undisputed" that he had hepatitis C, that he met the Department's standards for treatment of the disease, and that "furtherance of this disease can cause irreversible damage to [his] liver and possible death," petitioner alleged that "numerous inmates" in his prison community had died of the disease and that he was "in imminent danger" himself "due to [the Department's] refusal to treat him." *Ibid.* He had identi-

fied similar allegations in an earlier filing, explaining that "his liver is suffering irreversible damage" due to the decision to remove him from treatment and that he "will suffer irreparable damage if his disease goes untreated." Plaintiff's Objections to the Magistrate's Recommendations in Civ. Action No. 05–CV–00405–LTB–MJW, p. 3.

Respondents answered these filings with a motion to dismiss. The Magistrate Judge recommended, as relevant, that the District Court dismiss the complaint on the ground it failed to allege Dr. Bloor's actions had caused petitioner "substantial harm." Recommendation on Defendants' Motion To Dismiss, p. 12. The District Court issued a short order indicating its agreement with the Magistrate Judge and dismissing the complaint.

The Court of Appeals affirmed. It quoted extensively from the Magistrate Judge's discussion of "substantial harm" before holding that petitioner had made "only conclusory allegations to the effect that he has suffered a cognizable independent harm as a result of his removal from the [hepatitis C] treatment program." 198 Fed. Appx., at 698. Acknowledging decisions by courts that have found Eighth Amendment violations when delays in medical treatment have involved "life-threatening situations and instances in which it is apparent that delay would exacerbate the prisoner's medical problems" (and that have, moreover, indicated the Eighth Amendment "protects against future harm to an inmate"), *id.*, at 697 (internal quotation marks omitted), the court nevertheless found petitioner's complaint deficient: Petitioner had, according to the court, failed to "allege that as a result of the discontinuance of the treatment itself shortly after it began or the interruption of treatment for approximately eighteen months he suffered any harm, let alone substantial harm, [other] than what he already faced from the Hepatitis C itself," *id.*, at 698 (internal quotation marks omitted). Having reached this conclusion, the court saw

no need to address whether the complaint alleged facts sufficient to support a finding that Dr. Bloor had made her decisions with a "sufficiently culpable state of mind." *Id.*, at 697, 698 (internal quotation marks omitted).

It may in the final analysis be shown that the District Court was correct to grant respondents' motion to dismiss. That is not the issue here, however. It was error for the Court of Appeals to conclude that the allegations in question, concerning harm caused petitioner by the termination of his medication, were too conclusory to establish for pleading purposes that petitioner had suffered "a cognizable independent harm" as a result of his removal from the hepatitis C treatment program. *Id.*, at 698.

Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." Specific facts are not necessary; the statement need only " 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.' " *Bell Atlantic Corp.* v. *Twombly*, 550 U. S. ___, ___ (2007) (slip op., at 7–8) (quoting *Conley* v. *Gibson*, 355 U. S. 41, 47 (1957)). In addition, when ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint. *Bell Atlantic Corp.*, *supra*, at ___ (slip op., at 8–9) (citing *Swierkiewicz* v. *Sorema N. A.*, 534 U. S. 506, 508, n. 1 (2002); *Neitzke* v. *Williams*, 490 U. S. 319, 327 (1989); *Scheuer* v. *Rhodes*, 416 U. S. 232, 236 (1974)).

The complaint stated that Dr. Bloor's decision to remove petitioner from his prescribed hepatitis C medication was "endangering [his] life." Petitioner's Complaint 2. It alleged this medication was withheld "shortly after" petitioner had commenced a treatment program that would take one year, that he was "still in need of treatment for this disease," and that the prison officials were in the meantime refusing to provide treatment. *Id.*, at 3, 4. This alone was enough to satisfy Rule 8(a)(2). Petitioner, in

addition, bolstered his claim by making more specific allegations in documents attached to the complaint and in later filings.

The Court of Appeals' departure from the liberal pleading standards set forth by Rule 8(a)(2) is even more pronounced in this particular case because petitioner has been proceeding, from the litigation's outset, without counsel. A document filed *pro se* is "to be liberally construed," *Estelle*, 429 U. S. at 106, and "a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers," *ibid.* (internal quotation marks omitted). Cf. Fed. Rule Civ. Proc. 8(f) ("All pleadings shall be so construed as to do substantial justice").

Whether petitioner's complaint is sufficient in all respects is a matter yet to be determined, for respondents raised multiple arguments in their motion to dismiss. In particular, the proper application of the controlling legal principles to the facts is yet to be determined. The case cannot, however, be dismissed on the ground that petitioner's allegations of harm were too conclusory to put these matters in issue. Certiorari and leave to proceed *in forma pauperis* are granted, the judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SCALIA would deny the petition for a writ of certiorari.

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No. 06–7317. Decided June 4, 2007

JUSTICE THOMAS, dissenting.

I have repeatedly stated that the Eighth Amendment's prohibition on cruel and unusual punishment historically concerned only injuries relating to a criminal sentence. *Farmer* v. *Brennan*, 511 U. S. 825, 861 (1994) (opinion concurring in judgment); *Helling* v. *McKinney*, 509 U. S. 25, 42 (1993) (dissenting opinion); *Hudson* v. *McMillian*, 503 U. S. 1, 18–20 (1992) (dissenting opinion). But even applying the Court's flawed Eighth Amendment jurisprudence, "I would draw the line at actual, serious injuries and reject the claim that exposure to the *risk* of injury can violate the Eighth Amendment." *Helling*, *supra*, at 42 (THOMAS, J., dissenting). Consistent with these views, I would affirm the judgment of the Court of Appeals. I respectfully dissent.